Supreme Court, U. S.
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APPENDIX
Volume I – pages 1-310

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 74-878
and 74-879

NATIONAL LEAGUE OF CITIES, *et al.* (in No. 74-878), and STATE OF CALIFORNIA (in No. 74-879),

Appellants,

v.

HON. PETER J. BRENNAN, SECRETARY OF LABOR OF THE UNITED STATES,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

FILED JANUARY 17, 1975
PROBABLE JURISDICTION NOTED JANUARY 27, 1975

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Docket Entries by the Clerk of the District Court

DOCKET ENTRIES IN 74-1812
NATIONAL LEAGUE OF CITIES, et al.,
v.
HON. PETER J. BRENNAN
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[1974]

Dec. 12, Complaint, appearance filed D.A. & A.G. ser 12-13.

Dec. 12, Summons, Copies (3) and Copies (3) of Complaint issued Deft ser: 12/13/74.

Dec. 12, APPLICATION of pltfs. for Preliminary Injunction; P & A's.

Dec. 12, APPLICATION of pltfs. for convening of Three-Judge Court.

Dec. 12, NOTICE of application of Three-Judge Court, Gasch, J.

Dec. 13, DESIGNATION of the Honorable Barrington D. Parker, United States District Judge and the Honorable Harold Leventhal, United States Circuit Judge, to serve with the Honorable Oliver Gasch, United States District Judge, as members of a three-judge court to hear and determine this action. (N) Bazelon, C.J., U.S.C.A.

Dec. 18, MOTION of deft. for order shortening the time for service of notice of deposition or in the alternative enlarging time to respond to motion for preliminary injunction and postponing hearing on motion for preliminary injunction; P & A's; c/s 12/18/74.

Dec. 18, NOTICE by deft. to take deposition of Allen E. Pritchard, Jr.; c/s 12/18/74.

Dec. 18, NOTICE by deft. to take deposition of Charles A. Byrley; c/s 12/18/74.

Dec. 19, STIPULATION extending time for deft. to

respond to motion of pltfs. for preliminary injunction until Dec. 26, 1974. (signed 12/18/74). (N) Gasch, J.

Dec. 19, ORDER shortening time of defts. for serving notice of taking deposition of depositions set for 12-23-74 & 12-24-74. (See order for details). (N) Gasch, J.

Dec. 26, REQUEST by deft's counsel to the Clerk of the Court to file transcripts of the depositions of Allen E. Pritchard, Jr. and Charles A. Byrley with exhibits; c/m 12-26-74. (app. of Nathan Dodell, Ass't U.S. Atty.)

Dec. 26, DEPOSITION of Allen Pritchard, Jr.

Dec. 26, DEPOSITION of Charles A. Byrley.

Dec. 26, EXHIBITS 1-49 to deft's deposition; exhibit #1 to pltf's deposition; and joint deposition exhibits 4(a), (b), (c) and 6(a), (b), (c).

Dec. 26, MOTION of State of California, Evelle J. Younger, Ronald Reagan, Verne Orr, James G. Stearns, Frank J. Walton, Norman B. Livermore, and James E. Jenkins to intervene as party pltf.; P&A; affidavit c/s 12-26-74. (app. of Talmadge R. Jones, Deputy Attorney General) $5.00 paid & credited to United States.

Dec. 26, MOTION of State of California for order shortening time for hearing on motion to intervene; affidavit of Talmadge R. Jones; c/s 12-26-74. (fiat) (N) Pratt, J.

Dec. 26, ORDER shortening time for applicants intervenors for leave to move Court for an order granting applicant leave to intervene as party pltf on 2 days notice being given to pltf & deft. (N) Pratt, J.

Dec. 26, ORDER granting motion of State of California to intervene and permitting same to fully participate in pltfs application for Preliminary Injunction set for hearing on three Judge Court set for December 30, 1974. (N) Pratt, J.

Dec. 26, INTERVENOR complaint of The State of California, Evelle J. Younger, Ronald Reagan, Verne Orr, James G. Stearns, Frank J. Walton, Norman Livermore, Jr. and James E. Jenkins vs. Peter J. Brennan; c/s 12-26-74.

Dec. 27, MOTION of deft. to dismiss and opposition to pltffs' motion for preliminary injunction; Affidavit of Jack I. Karlin; Memorandum; c/s 12-27-74.

Dec. 27, APPLICATION of pltf. State of California, et al for preliminary injunction.

Dec. 27, REQUEST by Nathan Dodell, AUSA re: filing of attached letter dated Dec. 26, 1974, from Arnold T. Aikens, AUSA, to Charles S. Rhyne, Esq; attachment; c/m 12/27/74.

Dec. 30, MOTION of The State of Indiana, et al to intervene as parties pltf.; Notice; c/s 12/30/74. $5.00 paid & credited to U.S. by Rhyne.

Dec. 30, REPLY by pltfs. to motion by deft. to dismiss and opposition by deft. to motion by pltfs. for preliminary injunction; c/s 12/30/74.

Dec. 30, SUPPLEMENTARY affidavit of Jack I. Karlin; c/s & c/m.

Dec. 30, ADDITIONAL deposition exhibit by deft.

Dec. 30, AMENDED paragraph 39 of complaint by pltfs.; c/s 12/30/74.

Dec. 30, MOTION of pltf. for preliminary injunction and motion of deft. to dismiss heard and taken under advisement; motion of State of Indiana, et al to intervene granted. (Reporter: Dennis Bosard) Gasch, J., Leventhal, J., Parker, J.

Dec. 30, APPEARANCE of Talmadge R. Jones, Dep. Attorney General, State of California as counsel for pltfs.-intervenors, State of California, et al.

Dec. 30, APPEARANCE of Donald P. Bogard, Asst. Attorney General, State of Indiana, et al as counsel for pltfs.-intervenors, State of Indiana, et al.

Dec. 30, ORDER granting motion of the State of Indiana, State of Iowa, State of Maryland, State of Massachusetts, State of Mississippi, State of Missouri, State of Montana, State of Nebraska, State of Nevada, State of New Hampshire, State of Oklahoma, State of Oregon, State of South Carolina, State of South Dakota, State of Texas, State of Utah and the State of Washington to intervene as party-pltfs.; complaint filed Dec. 12, 1974, shall stand as complaint of record for intervenor-states. (N) Gasch, J.

Dec. 30, MOTION of the State of Indiana, et al for order shortening time for hearing on motion to intervene; affidavit of Charles S. Rhyne.

Dec. 30, ORDER shortening time for State of Indiana, et al, applicants-intervenors to intervene as parties pltf. (N) Gasch, J.

Dec. 30, APPLICATION of pltf.-intervenors, State of Indiana, et al, for preliminary injunction.

Dec. 31, ORDER denying motion of plaintiffs for preliminary injunction and granting motion of deft. to dismiss complaint. (N) Gasch, J., Leventhal, J., Parker, J.

Dec. 31, NOTICE of appeal by plaintiffs and intervenor-pltfs. to Supreme Court of the United States from order to Dec. 31, 1974. $5.00 paid and credited to U.S. by Rhyne.

1975

Jan. 6, NOTICE of appeal by pltf.-intervenor, The State of California, et al to Supreme Court of the United States from order of Dec. 31, 1974; c/m 1/3/75.

Jan. 8, CERTIFIED copy order Supreme Court of the United States Staying action pending further order of the Court. (signed 12/31/74) Burger, Chief Justice.

Jan. 13, DEPOSIT by Talmadge R. Jones, Deputy Attorney General, State of Calif. the sum of $5.00 for notice of appeal filed 1/6/75.

Jan. 14, COPY of letter from Supreme Court of the United States dated 1/13/75 continuing stay granted on 12/31/74 on condition that the appellant file jurisdictional statement on or before 1/17/75, and appellee file reply on or before 12:00 P.M., 1/23/75.

Jan. 31, CERTIFIED copies of orders (2) from Supreme Court of the United States noting probable jurisdiction.

Feb. 6, LETTER from Clerk, Supreme Court of the United States requesting certification and transmittal of entire record to Supreme Court.

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

The NATIONAL LEAGUE OF CITIES,
an Illinois Corporation, on
behalf of its member cities,
1620 Eye Street, N. W.,
Washington, D. C. 20006,

The NATIONAL GOVERNORS' CONFERENCE,
a District of Columbia Corporation,
on behalf of its members,
1150 Seventeenth Street, N. W.,
Washington, D. C. 20036,

The State of ARIZONA
N. Warner Lee, Attorney General
State Capitol
Phoenix, Arizona 85007,

METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON
COUNTY, Tennessee
Milton H. Sitton, Director of Law
204 Courthouse
Nashville, Tennessee 37201,

The City of SALT LAKE CITY, Utah
Roger F. Cutler, City Attorney
101 City and County Building
Salt Lake City, Utah 84114,

The City of LOMPOC, California
Alan Davidson, City Attorney
119 West Walnut Avenue
Lompoc, California 93436,

The City of CAPE GIRARDEAU, Missouri
Thomas Utterback, City Attorney
Office of the City Attorney
Cape Girardeau, Missouri 63701,

Plaintiffs,

v.

The Honorable PETER J. BRENNAN
Secretary of Labor
of the United States,

Defendant.

Civil Action
No. 74-1812

COMPLAINT FOR DECLARATORY JUDGMENT THAT THE 1974 AMENDMENTS TO THE FAIR LABOR STANDARDS ACT UNCONSTITUTIONALLY ATTEMPT TO REGULATE ESSENTIAL STATE AND LOCAL GOVERNMENT FUNCTIONS, AND FOR PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF.

1. This action arises under the Fair Labor Standards Act (hereinafter sometimes "Act"), 52 Stat. 1060, as

amended, 29 U.S.C. §201 *et seq.* This Court has jurisdiction, as this is an action relating to commerce, under 28 U.S.C. §1337.

2. This action further arises under the Constitution of the United States and the Fifth, Tenth and Eleventh Amendments to the Constitution of the United States. The matter in controversy, exclusive of interests and costs, exceeding the sum of ten thousand dollars, this Court has jurisdiction under 28 U.S.C. §1331.

3. Public Law 93-259, 88 Stat. 55 amending 29 U.S.C. §201 *et seq.*, (hereinafter sometimes "1974 Amendments") became effective on May 1, 1974. Provisions of the 1974 Amendments to the Act relating to police and fire protection personnel become effective on January 1, 1975. Plaintiffs challenge specifically the constitutionality of the following provisions of the Act as amended; in §3(d), the definition of "employer" is amended to include a "Public Agency"; in §3(e)(2), the definition of "employee" is amended to exclude in the case where the employer is a State public agency, only persons who are (1) not subject to a State's civil service laws and (2) publicly elected, or member of the personnel staff, or policy making appointee, or immediate legal advisor of one publicly elected; in §3(h), the definition of "industry" is amended to include "other activity" in addition to the original trade business or industry language; in §3(r), the definition of "enterprise" is amended to include within the activities deemed to be performed for a business purpose, those activities performed by any person in connection with the activities of a public agency; in §3(s), the definition of "Enterprise engaged in commerce or in the production of goods for commerce" is amended to include an activity

of a public agency and to state that, "The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling or otherwise working on goods or materials that have been moved in or produced for commerce"; in § 3(x), "public agency" is defined to include: "the Government of a State or political subdivision thereof; any agency of . . . a State or political subdivision of a State; or any interstate governmental agency"; in § 6(b), specific rates of compensation are provided for newly covered employees; in § 7(k), a limited and diminishing exemption for police and fire protection employees is created, which exemption is also stated in §13(b) (20); both § 7(k) and § 13(b) (20) become effective January 1, 1975; in § 13(b) (7) the former overtime exemption for local transit companies, now including publicly owned transit companies, doing an annual business of less than $250,000 is to be phased out by May 1, 1976; in §16(b), State employees are granted a cause of action against a public agency in "any Federal or State court of competent jurisdiction"; in § 16(c), the Secretary of Labor is authorized to bring an action for both liquidated damages and back pay on behalf of an employee subject to certain conditions.

4. Section 15 of the Act lists the prohibited acts as violations of §6, 7, 11, 12 or any regulations issued by the Secretary pursuant to his rulemaking powers under § 14.

5. Plaintiff National League of Cities has as members over 15,000 Cities who have over 2,000,000 employees. These Cities are political subdivisions of the 50 States. The National League of Cities also has as members State

municipal leagues, which leagues also have as members Cities who are political subdivisions of States. The National League of Cities is owned and operated by its member Cities and State municipal leagues, with said State leagues in turn being owned and operated by the leagues' member Cities in each State. The member Cities and State leagues govern the National League of Cities through an elected Board of Directors. The National League of Cities brings this action on its behalf and on behalf of each of its member Cities. Article I of its bylaws states its function as *inter alia*, "the adoption of a national municipal policy and its implementation as the chief vehicle for the development of effective municipal government."

6. Plaintiff National Governors' Conference is a non-profit organization incorporated on April 2, 1974, under the laws of the District of Columbia. The Conference was originally organized in 1908. Its membership is composed of the Governors of the several States of the United States, the Virgin Islands, Guam, American Samoa and the Commonwealth of Puerto Rico. As listed in Art. II of its Articles of Organization, the Conference is established *inter alia*: "to vigorously represent the interests of the states in the Federal system". The Conference brings this action on its own behalf and on behalf of its members.

7. Plaintiff Arizona is one of the fifty sovereign States of the United States. Acting in its sovereign governmental capacity, it performs essential functions which are necessary and indispensable to its existence as a sovereign State and which are required to be performed under its own Constitution and laws and under the Constitution and laws of the United States. Its unique

needs and the needs of its residents for essential governmental services are distinct from those of each of the other United States. Its Government structure, geography, climate, topography and demography require unique policy and personnel management decisions which in many respects differ from those made by the other States of the United States. It is not in competition with any of the other States or any private enterprise when making these decisions or performing these essential governmental functions. Arizona's decisions are made through a republican form of Government, by the votes of its citizens in elections conducted under its Constitution. It does not have the power, absent agreement, to enforce or effectuate its decisions beyond its own borders into any other State.

8. Plaintiff Metropolitan Nashville (pop. 447,877), a member of Plaintiff National League of Cities, is a metropolitan Government consisting of the City of Nashville and Davidson County established under the laws of the State of Tennessee. As a political subdivision of Tennessee, it shares in that State's sovereignty and performs essential functions which are necessary and indispensable to its existence as a political subdivision of Tennessee and which are required to be performed under its charter and ordinances, the Constitution and laws of Tennessee, and the Constitution and laws of the United States. Its unique needs and the needs of its residents for essential governmental services vary from the needs of other political subdivisions within Tennessee and are distinct from the needs of political subdivisions of each of the other United States. Its Government structure, geography, climate, topography and demography require unique policy and personnel management decisions which

may vary from those of other political subdivisions within Tennessee and which in many respects differ from those made by political subdivisions of the other United States. It is not in competition with any other political subdivisions within or without Tennessee or any private enterprise when making these decisions or performing these essential functions. Instead, it acts through the republican form of its State Government in conjunction with its own municipal Government, through officials elected by the votes of its citizens. It does not have the power, absent agreement, to enforce or effectuate its decisions beyond its State-designated jurisdictional boundaries and beyond the Tennessee borders into any other State.

9. Plaintiff Salt Lake City (pop. 175,885), a member of Plaintiff National League of Cities, is a City established under the laws of the State of Utah. As a political subdivision of Utah, it shares in that State's sovereignty and performs essential functions which are necessary and indispensable to its existence as a political subdivision of Utah and which are required to be performed under its own laws, the Constitution and laws of Utah, and the Constitution and laws of the United States. Its unique needs and the needs of its residents for essential governmental services vary from the needs of other political subdivisions within Utah and are distinct from the needs of political subdivisions of each of the other United States. Its Government structure, geography, climate, topography and demography require unique policy and personnel management decisions which vary from those of other political subdivisions within Utah and which in many respects differ from those made by political subdivisions of the other United States. It is not

in competition with any other political subdivisions within or without Utah or any private enterprise when making these decisions or performing these essential functions. Instead, its decisions are made through the republican form of its State Government in conjunction with its own municipal Government, by those elected by the votes of its citizens. It does not have the power, absent agreement, to enforce or effectuate its decisions beyond its State-designated jurisdictional boundaries and beyond the Utah borders into any other State.

10. Plaintiff Lompoc (pop. 25,600), a member of Plaintiff National League of Cities through membership in the League of California Cities, is a City established under the laws of the State of California. As a political subdivision of California, it shares in that State's sovereignty and performs essential functions which are necessary and indispensable to its existence as a political subdivision of California and which are required to be performed under its own laws the Constitution and laws of California, and the Constitution and laws of the United States. Its unique needs and the needs of its residents for essential governmental services vary from those of other political subdivisions within California and are distinct from the needs of political subdivisions of each of the other United States. Its Government structure, geography, climate, topography and demography require unique policy and personnel management decisions which vary from those of other political subdivisions within California and which in many respects differ from those made by political subdivisions of the other United States. It is not in competition with any other political subdivisions within or without California or any private enterprise when

making these decisions or performing these essential functions. Instead, its decisions are made through the republican form of its State Government in conjunction with its own municipal Government officials elected by the votes of its citizens. It does not have the power, absent agreement, to enforce or effectuate its decisions beyond its State-designated jurisdictional boundaries and beyond the California borders into any other State.

11. Plaintiff Cape Girardeau (pop. 31,282), a member of Plaintiff National League of Cities, is a City established under the laws of the State of Missouri. As a political subdivision of Missouri, it shares in that State's sovereignty and performs essential functions which are necessary and indispensable to its existence as a political subdivision of Missouri and which are required to be performed under its own laws, the Constitution and laws of Missouri, and the Constitution and laws of the United States. Its unique needs and the needs of its residents for essential governmental services vary from the needs of other political subdivisions within Missouri and are distinct from the needs of political subdivisions of each of the other United States. Its Government structure, geography, climate, topography and demography require unique policy and personnel management decisions which vary from those of other political subdivisions within Missouri and which in many respects differ from those made by political subdivisions of the other United States. It is not in competition with any other political subdivisions within or without Missouri or any private enterprise when making these decisions or performing these essential functions. Instead, it is governed through the republican form of its State Government in conjunction with its own municipal Government by the

officials elected by the votes of its citizens. It does not have the power, absent agreement, to enforce or effectuate its decisions beyond its State-designated jurisdictional boundaries and beyond the Missouri borders into any other State.

12. Defendant, Peter J. Brennan, is the Secretary of Labor of the United States, who is charged by law with the implementation and enforcement of the Act.

13. The City of Cape Girardeau, Missouri, has officially stated in a letter to Defendant's Regional Solicitor of Labor, dated October 15, 1974, that it will not comply with the 1974 Amendments, because the Act is unconstitutional. It will not therefore make itself available for Federal audits or inspections of any kind by Defendant.

14. On November 20, 1974, Defendant herein notified Plaintiff herein, the City of Cape Girardeau, of a civil action to be filed imminently against Cape Girardeau in the United States District Court for the Eastern District of Missouri, Southeastern Division, alleging violation by Cape Girardeau of §§ 6(b) and 15(a) (2) of the Act and demanding an injunction forcing Cape Girardeau to pay the overtime compensation required under the Act.

15. The City of Lompoc, California, after exchange of correspondence with the agent of Defendant herein, the Chief of the Division of Minimum Wage and Hours Standards of the Department of Labor, and a determination by Defendant and his agent that 29 C.F.R. § 778 prohibiting the use of compensatory time off beyond the work period applied to State and local Government, has indicated by its City Attorney the decision to continue the practice of awarding compensatory time off under existing local law and

procedures on the bases that, (1) the Act itself does not prohibit the use of compensatory time off and, (2) the Act, being unconstitutional, cannot invalidate said practice.

16. Plaintiffs States and Cities provide the following essential Government services, among others, each of which will be affected in cost or quality, or both, by the 1974 Amendments to the Act: police protection services; fire protection services; highway repair and snow removal services; trash collection, sewage treatment and other sanitation and health services; park maintenance and other recreational services; libraries; state and local administrative and regulatory agencies which enforce laws and regulations preserving the public health, safety and welfare, including inspection of buildings, licensing of occupations and businesses, administration of public assistance in emergency and poverty situations, preservation of environmental quality, administration of election, legislative, executive and judicial processes, administration of regulations preserving both public order and free expression of views and information, protection of the public against fraud and sharp practice; non-elected, non-appointed personnel such as tax collectors involved in non-competitive governmental functions which are done or can only be done exclusively by Government. In providing these essential Government services, Plaintiffs extensively use voluntary boards and commissions, whose members are not compensated, or who are paid nominal compensation. The Act makes use of these voluntary boards, commissions and workers financially impossible.

17. These said essential Government services inhere in the existence of States and their political subdivisions.

Without these essential Government services a State could not exist for the protection and benefit of the people within the territory of the State.

18. States and Cities, as political subdivisions of a State, cannot fail or refuse to provide these essential Government services consistently with provisions of State Constitutions, laws, charters, ordinance provisions and provisions of the United States Constitution.

19. Plaintiffs States and Cities have exercised their sovereign judgment in establishing personnel policies which will insure the most effective provision of essential Government services at the least cost to the taxpayers of Plaintiffs, consistently with fairness in compensating and regulating the working hours and conditions of the employees of Plaintiffs who provide essential Government services.

20. Under the Tenth Amendment of the Constitution of the United States one of the most vital sovereign powers reserved to the States is the power to employ personnel to carry out essential governmental functions and to completely control by rules, regulations and orders the performance of said employees in carrying out said essential governmental functions.

21. States and Cities have developed law on personnel, including civil service laws, designed to take care of the unique governmental situation of each State and each City as to industry, weather, and similar considerations. The Act, and its Regulations, purport to nullify such State and local legislation and impose uniform nationwide Federal rules and Regulations for all State and City personnel. For this imposition there is no rational basis.

22. Plaintiff State of Arizona operates under Arizona constitutional and law provisions providing essential Government services, and in performing other functions, through its State and City employees. These law provisions include: a minimum wage for minors which applies to employment in "any industry, trade, business or branch thereof", Ariz. Rev. Stat. §§23--311-29 (1974 Supp.); a requirement that each City or town of more than seven thousand inhabitants, having a salaried police and fire department, pay a minimum wage to every foot patrolman and horseman after the third year of employment, Ariz. Rev. Stat. § 9-902 (1965); a constitutional provision defining a lawful day's work in all employment by, or on behalf of, the State or any of its political subdivisions, Ariz. Const. Art. XVIII, § 1; *State* v. *Boykin*, 109 Ariz. 289, 508 P. 2d 1151 (1973); legislation providing overtime compensation for work by public employees performing manual or mechanical labor, Ariz. Rev. Stat. § 23-391 (1974 Supp.).

23. Plaintiff City of Salt Lake operates under Utah State constitutional and law provisions in providing essential governmental services, and in performing through its employees. These law provisions include: a minimum wage provision for women and minors, an industrial commission to oversee wages and working conditions and to set maximum hours, a wage board made up of industry and employee representatives to determine the minimum wage, Utah Code, §34--22-5 *et seq.* (Supp. 1973); a constitutional provision defining a day's work on all works or undertakings carried on or aided by the State, County or Municipal Governments, Utah Const. Art. XVI, § 6; a requirement that State and local Government employees working on the

construction of public works excluding maintenance work, must be paid the general prevailing wage rate for work of a similar character in the locality, Utah Code, §34--30-2 (Supp. 1973), and a provision for overtime compensation, Utah Code, §34--30-8 (Supp. 1973).

24. Plaintiff, Metropolitan Government of Nashville and Davidson County operates under the Tennessee State laws in providing essential governmental services, and in performing all other functions, through its employees. These laws include a provision making it unlawful for any "person, firm, corporation or association of any kind" to deny employment because of affiliation with a labor organization, Tenn. Code § 50-208 (1956).

25. Plaintiff City of Cape Girardeau operates under Missouri State laws in providing essential governmental services and in performing other functions through its employees. These laws include a provision regulating child labor, Vern. Ann. Mo. Stat., §294.011 *et seq.* (1971); regulation of wages on public works, requiring that those employed in the construction of public works, including highways, must be paid the prevailing hourly rate for work of a similar character in the locality in which the work is performed, Vern. Ann. Mo. Stat., § 290.210 *et seq.* (1971), as amended (Supp. 1974); laws regulating police and firemen hours, Vern. Ann. Mo. Stat., §§ 85.290, 85.100 (1971); a provision allowing with certain exceptions State and local Government employees to join labor organizations and bargain collectively, Vern. Ann. Mo. Stat., §105.500 *et seq.* (Supp. 1974); a provision that, with respect to firefighters, a firemen's arbitration board will be appointed, at the request of either the employees or the governing body, to resolve disputes over wages, hours, and conditions of employment, Vern. Ann. Mo. Stat., §290.350 *et seq.* (1971).

26. Plaintiff City of Lompoc operates under California State laws in providing essential governmental services, and in performing other functions through its employees. These law provisions include a minimum wage law applicable to persons "employed in any occupation, trade or industry" establishing an industrial commission to determine whether wages in any occupation are inadequate to supply the cost of living and commission representatives to determine the appropriate minimum wage, Cal. Labor Code, §§ 1171-1199 (Deering Supp. 1974); provisions defining the workweek of the State employee, and authorizing the State personnel board to provide overtime compensation for State employees, Cal. Govt. Code, §§ 18020, 18021.5 (Deering 1973); specific statutes granting State and local firefighters the right to join labor organizations and bargain collectively, Cal. Labor Code, §§ 1960-1962 (Deering 1964); statutes which grant State employees and employees of public agencies the right to join labor organizations and bargain collectively, requiring that the State and other public employers confer with employee representatives, and provide for mediation of unresolved disputes through either local procedures or through the Department of Industrial Relations, Cal. Govt. Code, §§ 3500-10, 3525-36 (Deering 1973).

27. In programs developed by experience for the most efficient fulfilling of responsibilities to their citizens and others within their territory, Plaintiffs have implemented the use of compensatory time off, which under the 1974 Amendments to the Act, Plaintiffs would no longer be able to maintain. Compensatory time off is the payment of overtime in the form of paid time off at some future date convenient to both employer and employee. It

allows the employee to have more freedom to choose his time off and more time off. It avoids demeaning and wasteful "make-work" projects during slow periods. It allows the employer to most efficiently deal with many areas of Government which involve "peak" employment problems. It has been enthusiastically supported by employees who welcome the flexible approach it represents, and its invalidation under the 1974 Amendments has created severe morale problems.

28. In programs developed by experience for the most efficient fulfilling of responsibilities to their citizens and others within their territory, Plaintiffs have implemented the use of paid volunteers, which under the 1974 Amendments to the Act, Plaintiffs would no longer be able to maintain. Paid volunteers are compensated on a per-job or monthly fee basis constituting a nominal stipend for the work done. Many States and Cities pay paid volunteers a wage sufficient only to make these employees eligible for workmen's compensation under State laws. This practice is most prevalent in police and fire protection services. Under Defendant's proposed Regulations for police and fire personnel, § 553.10, intended to be effective January 1, 1975, any stipend beyond reimbursement of out-of-pocket expenses, and other limited exceptions destroys the volunteer status and subjects the policeman or fireman to the Act. This will seriously curtail service now provided by the numerous small, independent volunteer fire departments across the country. The practice of paid volunteers is similarly employed, and will result in similar added expense or diminution of service in areas such as poll workers in elections, and parks, recreation and government projects for involvement of the young, elderly and disadvantaged in the community.

29. In programs developed by experience for the most efficient fulfilling of responsibilities to their citizens and others within their territory, Plaintiffs have implemented the use of joint employment, which under the 1974 Amendments to the Act, Plaintiffs would no longer be able to maintain. Joint employment is the employment of personnel in more than one capacity within the State and City Government, whereby many full-time workers augment their income by part-time jobs in other areas of Government employment. Under Defendant's proposed Regulations for police and fire personnel, §553.8, intended to be effective January 1, 1975, if the part-time employment involves activities other than police and fire protection, it is possible to lose the exemption provided in § 7(k) of the Act, subjecting police and firefighters to the 40 hour week required by § 7(a). In areas other than police and fire protection, all hours worked for the State or political subdivision, regardless of which agency or department, must be counted towards the hours worked for that week. The requirement of the Act to pay overtime rates for part-time jointly employed personnel will force the end of this practice, which has been beneficial to employer and employee alike.

30. In programs developed by experience for the most efficient fulfilling of responsibilities to their citizens and others within their territory, Plaintiffs have implemented the use of mutual aid police and fire agreements, which under the 1974 Amendments to the Act, Plaintiffs will no longer be able to maintain. Mutual aid agreements allow the pooling of police or fire protection during emergencies or disasters which by their immediacy and gravity are too large for a single agency to combat. The participating agencies generally do not charge for the aid

rendered during such emergencies and disasters. However, under Defendant's proposed Regulations for police and fire personnel, § 553.9, intended to be effective January 1, 1975, all hours worked in aid of other jurisdictions must be counted towards hours worked in the home jurisdiction. This requirement forces the choice between abandoning these agreements, or massive unexpected overtime expenses whenever an emergency situation arises. These overtime expenses, by reason of their unpredictability, present a massive hidden liability which could itself bankrupt smaller political subdivisions.

31. In many other programs developed by experience for the most efficient fulfilling of responsibilities to their citizens and others within their territory, Plaintiffs have implemented the use of employment policies other than those described in Paragraphs 27 through 30 which under the 1974 Amendments to the Act, Plaintiffs would no longer be able to maintain.

32. The Fair Labor Standards Act was enacted in 1938 and has been amended in 1940, 1949, 1955, 1956, 1961, 1963, 1965, 1966, 1972 and 1974. Under the original Act and under amendments prior to the 1966 Amendments, Plaintiffs States and Cities were specifically and unqualifiedly exempted from the Act. The 1974 Amendments, 88 Stat. 55, in express terms include Plaintiffs under the definition of "public agency".

33. The 1974 Amendments to the Act, subject Plaintiffs States and Cities to hundreds of rules, Regulations and interpretations allegedly implementing the Act (29 C.F.R., sections 500-1899) and these rules, Regulations and interpretations are now applicable to the newly covered State and local employees. The most recent proposed addition to this volume of Regulations

are proposed rules pertaining to "Employees of Public Agencies Engaged in Fire Protection or Law Enforcement Activity (Including Security Personnel in Correctional Institutions)", 39 Fed. Reg. 38663-66 (1974).

34. In addition, Plaintiffs are subject to Opinion Letters of the Wage and Hour Division of the Department of Labor, many of which have been issued to date dealing with the extended coverage to State and local employees. Examples are: Opinion Letter No. 1325, stating that full-time student employees of a public library are not eligible under § 14 of the Act for wage payment at 85% of the minimum wage as employees of a retail or service establishment, since a library is engaged in the cultural improvement of a community, "a purpose entirely foreign to the accepted understanding of a 'retail' activity"; Opinion Letter No. 1328, stating that beaches operated by a municipal government are not seasonal industries under § 7(c) of the Act; Opinion Letter No. 1331, reiterating the narrow terms of the exemption for employees in the legislative branch of a State Government, stating that employees can be excluded from the Act's coverage only if outside the civil service laws of the governmental jurisdiction involved, and meeting one of the other requirements under § 3(e)(2)(c) (ii) and stating four criteria, also set out to determine if an employee "is selected by the holder of such an office to be a member of his personal staff" or "is appointed by such an officeholder to serve on a policymaking level" under § 3(e) (2) (c) (ii) (II) and (III) of the Act; Opinion Letter No. 1334, setting requirements counting volunteer time for City projects toward hours worked; Opinion Letter No. 1336,

exempting petit and grand jurors from coverage under the Act.

35. If constitutional, the Act conflicts with and replaces, by its hundreds of rules and Regulations, the State constitutional, and statutory provisions governing State and City personnel and civil services. The Act also replaces City Charter and ordinance provisions governing personnel and civil service.

36. The Act changes control of State and City employees from States and Cities to Federal control. For the first time in 200 years the Federal Government is claiming constitutional power to thus take over control of this vital internal Government function of States and Cities. The Federal Government's claim of constitutional power to impose employee age, wage, hour, and other personnel controls upon States and Cities is of such sweeping character as to effectively take over control not only of State and City personnel but of State and City budgets because personnel costs are usually a major item in said budgets. No more vital internal function of government exists for States and Cities than control of their employees and the budget items relating to said employees.

37. Unconstitutional interference with the sovereign governmental functions and internal affairs of Plaintiffs occurs through the claim by Defendant of power under the Act to impose upon Plaintiffs a vast number of Regulations, rules, interpretations and decisions issued by Defendant covering employee relations of Plaintiffs and requiring the making, keeping and preservation by Plaintiffs of vast amounts of specified records for numerous inspections by Defendant's enforcement and administrative officials.

38. The Act, Regulations promulgated thereunder and Opinions construing the Act, place Plaintiffs, and all States, political subdivisions and Cities under a massive burden of numerous Federal officers and employees, and remove ultimate control of State and local Government personnel services from States and localities and place that ultimate control in Defendant in Washington, D. C.

39. The Act and its Regulations are confusing, complicated, inequitable and so vague and incomprehensible as applied to State and City employees as to violate the Due Process Clause of the Fifth Amendment of the Constitution of the United States. Said Act and Regulations do not improve State and City personnel, or the services they render, and in many respects are irreparably damaging as they cause enormous expenses and, at the same time, a lessening of service. Existing State law, City Charter and ordinance provisions have been developed and adopted over the years to meet the unique situation of each State and City; and their laws, Charters and provisions are fair, reasonable and devoid of the problems and damage caused by the Act and the proposed Regulations thereunder.

40. The imposing of the Act's provisions and the implementing thereof by Defendant, and the Federal officers and employees acting under his direction and supervision, in replacement of State and City personnel law and State and City implementing officers and employees casts a vast unreasonable burden upon States and Cities. This damaging burden has no rational relation to commerce among the States and cannot be constitutionally based upon the Commerce Clause of the Constitution of the United States, and is in addition a direct violation of the Tenth Amendment of the Constitution of the United States.

41. The 1974 Amendments to the Act have caused and will cause to Plaintiffs irreparable injury and damage, and will irreparably injure and damage all Cities and States situated similarly to Plaintiffs, as described herein. The 1974 Amendments to the Act will require Plaintiffs States, political subdivisions and Cities to meet enormously increased costs in providing the same essential Government services provided presently. The ability of Plaintiffs to meet these increased costs, which will not be accompanied by increases in the services provided, is circumscribed by some State constitutional provisions limiting taxes and debts, the purpose of which is to safeguard the fiscal integrity of Plaintiffs States and Cities, for the benefit of the citizens thereof.

42. The 1974 Amendments to the Act will force Plaintiffs to forego planned new Government services, owing to the greatly increased cost of providing current or reduced essential Government services, said increased costs arising out of inflexible provisions of the Act rather than out of increased total costs of salaries for all municipal services.

43. The 1974 Amendments to the Act will make it substantially more difficult for Plaintiffs States and Cities to get and keep qualified employees to provide essential Government services, owing to the Amendments' and Act's effective prohibition of the employment practices such as compensatory time off and joint employment alleged in Complaint ¶¶ 27-31 *supra* which benefit employees of Plaintiffs.

44. The great diversity of State and local Governments makes full computation of the nationwide impact of these Amendments impossible. However, a recently released International City Management Association

(ICMA) study of fire protection services across the country provides a basis for determining the immense impact for that budget alone, which is but a fraction of each City's budget. The estimated 200,000 full-time paid firefighters constitute a conservatively estimated payroll of $2 billion annually. The extensive ICMA study indicates that there are three main groups of fire departments which will incur the most liability as a result of the Act: (1) those with an average number of hours per week greater than the 60 hours per week presently required (about 15% of the Cities sampled), (2) those with more than 28 days in their work periods (about 10% of those sampled), and (3) those who employ a pay back system whereby a fireman is paid for more hours than he works in each period but must pay back a certain number of shifts in a year (about 10% of those sampled). Allowing for overlap between these groups and calculating the average increase from the data gathered, the minimum impact for the first year on fire personnel budgets nationwide is estimated at a minimum of $200,000,000. By 1978 the estimated cumulative impact on fire personnel budgets is estimated to be $1 billion. This represents a 50% increase in fire protection costs after three years owing to the 1974 Amendments alone. Increased costs for other essential State and City governmental functions are reasonably certain to amount to billions of dollars per year due to the impact of these 1974 Amendments to the Act.

45. Plaintiff Metropolitan Government of Nashville and Davidson County has concluded that the 1974 Amendments to the Act will increase the cost of providing only essential police and fire protection, with no increase in service provided, and no increase in salary levels, by $938,000 per year.

46. Furthermore, Plaintiff Metropolitan Government of Nashville and Davidson County, Tennessee, estimates that about 40% of its policemen work in joint employment relationships for the State and Metropolitan Government, as defined in Defendant's new proposed Regulations for police and fire personnel (§ 553.8, intended to be effective on January 1, 1975). These police officers average at least 16 hours a week in this employment. If the proposed rules become effective it is possible that the Metropolitan Government would have to pay overtime on this 16 hours a week, resulting in an overtime payment of $19,000 per week or a total of approximately $1 million per year. The alternative to this added liability is to curtail necessary services.

47. Plaintiff Lompoc, California, will suffer vast as yet inestimable increased costs if it were to comply with the Act with no increase in salary levels and no increase in services provided.

48. Plaintiff Cape Girardeau, Missouri, estimates the present annual fire department budget of $350,000 would have to be increased by another $250,000 to $400,000 per year in order to comply with the Act. This would translate as an increase from the present expenditure rate of 50 cents per $100 assessed valuation to 90 cents per $100 assessed valuation. The citizens of Cape Girardeau cannot comply with such a drastic immediate increase in the cost of their Government.

49. Plaintiff City of Salt Lake will suffer the following irreparable injury as a result of the 1974 Amendments: the payment of time and one-half instead of compensatory time off for the more than 7000 overtime hours accumulated annually merely to provide necessary snow removal services; discontinuance of shift trading,

and flexible scheduling practices; increased costs for the hiring of, or elimination of students to work in the public parks each summer; increased costs for the hiring of, or elimination of student interns from the University of Utah; an estimated $500,000 in additional overtime costs and a diminution of some Government services to meet even this conservative estimate; and enormous morale problems.

50. Plaintiff Arizona estimates that for fiscal year 1975-76, the Act will require a $1.5 million increase in the cost of providing State police services, a $200,000 increase in the cost of providing State health services and a $300,000 increase in costs of highway services. This, coupled with additional employee related costs of $300,000, and $250,000 extra needed in highway construction costs, brings the estimated total impact of the Act for one year to over $2.5 million for the State of Arizona alone.

51. Member Cities of Plaintiff National League of Cities, in planning their budgets for upcoming years, have reported to Plaintiff National League of Cities many other illustrations of the irreparable injury they will suffer as a result of the Act with special damaging impact on such cities who up to now have depended on much volunteer public service. Examples are here set out in paragraphs 52 through 72.

52. Owing to the burdensome requirements of the 1974 Amendments, the City of Los Angeles, California (pop. 2,816,061) estimates an additional expense for fiscal year 1975-76 in the budget for salaries of fire personnel only, of over $2.5 million, plus an increase in pension costs of between $160,000 and $430,000. This increased cost is the result of time and one-half payment

for overtime and hiring of additional uniformed personnel with no increase in service. If in 1978, police workweeks are brought into parity with other employees under the Act the estimated overtime costs for that department alone would be between $4 and 6 million. These estimates presume the continuance of present salary levels and take into account no future increases in services provided.

53. Owing to the burdensome requirements of the 1974 Amendments, the Sacramento, California (pop. 254,413) budget for the current fiscal year 1974-75 has already incurred an extra $350,000 cost due merely to non-police and fire services. Also, the City's carefully developed system of compensatory time off, favored by management and employees alike, must now be abolished as illegal under the Amendments. In the area of fire protection services, a new Memorandum of Understanding will be negotiated between fire personnel and the City for fiscal year 1975-76. The uncertainty presented by the diminishing exemption under § 7(k) of the Act renders these negotiations nearly impossible. By January 1, 1977, in order to merely meet the Act's requirements in fire protection services, the City must either diminish services or hire 16-17 additional firefighters at a cost of $310,000 in 1974 firemen wages. If in 1978, the Secretary of Labor study (upon which, under the Act, workweeks will be based) should result in a 52 hour workweek, Sacramento's additional cost for present firefighting service would increase $636,000; if a 50 hour week is established, $993,000; if a 48 hour week is established, $1,379,000. Furthermore, conflict between the proposed Regulations for fire and police protection service and the already existing volume of

Regulations (29 C.F.R. §§ 500-1899) create uncertainties as to who is and who is not covered under the Act.

54. Owing to the burdensome requirements of the 1974 Amendments, Pasadena, California (pop. 113,327) estimates that in 1978 when the present police and fire personnel exemption could be expected to be in parity with the present requirement for others covered under the Act, the same level of fire protection service at the same wage rate would cost an additional $1.5 million representing a 50% increase over the current budget for such activities of $3 million.

55. Owing to the burdensome requirements of the 1974 Amendments the City of San Buenaventura, California (pop. 47,089) estimates its overtime costs for fire personnel to be $72,700 in 1975, $63,200 in 1976, $126,500 in 1977 and $31,600 for each additional hour the workweek is decreased by the 1978 survey. These increased costs represent an increased payroll cost by the end of 1977 of 29.1%.

56. Owing to the burdensome requirements of the 1974 Amendments, in Newark, California (pop. 27,153) an immediate impact of nearly $18,000 will be incurred just to meet the Act's new requirements for overtime for outside training, shift change, manning, call back and staff meetings. The costs of overtime and additional personnel to meet the Act's new hour requirements would range from $24,000 in 1977 to approximately $183,000 in 1978.

57. Owing to the burdensome requirements of the 1974 Amendments, Montebello, California (pop. 42,807) estimates its overall additional overtime costs to be $140,000 per year. In fire suppression service alone it

expects a 27.3% increase in overtime costs for 1975 with an estimated combined regular salary and overtime cost increase of $117,922 by the impact date of 1977. Its police department will be affected in that "Reserve" officers who previously worked on a call and emergency basis for a stipend of $25.00 per month, now may not work in excess of 12 and 1/2 hours a month. This program, therefore, has been effectively abolished.

58. Owing to the burdensome requirements of the 1974 Amendments, Menlo Park, California (pop. 26,734) in order to prevent diminution of services in the areas of crime prevention, traffic enforcement, case investigation and emergency incident response must spend an additional $120,000 annually.

59. Owing to the burdensome requirements of the 1974 Amendments, in Inglewood, California (pop. 87,985) the police department must curtail its effort to achieve affirmative action goals by providing employment opportunities for men and women interested in a career in law enforcement. Under the contractual arrangement trainees worked 20 hours per week at $3.57 per hour and books and tuition were provided free for the 20 hours per week of classes. Unable to meet the stricter financial burden placed on this program by the Act the City has been forced to abolish it.

60. Owing to the burdensome requirements of the 1974 Amendments, Clovis, California (pop. 13,856) must make a decision regarding its internship programs with California State University in Fresno to give students the opportunity to observe and participate, to a limited extent, in daily government operation. Students received as compensation, school credit and a small stipend. The Fair Labor Standards Act will cause the City

to eliminate the program or the pay for interns. Some students will have to be excluded from the program either way.

61. Owing to the burdensome requirements of the 1974 Amendments, Coronado, California (pop. 20,910) estimates additional overtime costs in its fire department alone of over $33,000 for 1975, over $59,000 for 1976 and over $111,000 for 1977.

62. Owing to the burdensome requirements of the 1974 Amendments, Sumter, South Carolina (pop. 23,895) estimates its overall additional overtime expense and wage increase will amount to $235,000 per year. In addition, the City of Sumter will have to terminate part-time firefighters who also work in other City departments.

63. Owing to the burdensome requirements of the 1974 Amendments in Lodi, California (pop. 28,691) the necessity that the work period be seven days rather than the previous practice of one month means extra costs in the computation of payrolls which Lodi must do mechanically, there not being the benefit of a computer available to the City.

64. Owing to the burdensome requirements of the 1974 Amendments, Downey, California (pop. 88,445) has been forced to abandon an effective proposal for twelve-hour police dispatcher shifts since the scheduling would have resulted in employees working less than 40 hours in some weeks while more than 40 hours in others with overtime costs incurred.

65. Owing to the burdensome requirements of the 1974 Amendments, in Randolph, New Jersey, some full-time employees no longer may serve as staff for volunteer boards or commissions. Since all of these hours

must be counted towards "hours worked" under the Act, this practice, helpful to the municipality and commission, must be discontinued and paid staff hired, increasing the cost to the City.

66. Owing to the burdensome requirements of the 1974 Amendments, Phoenix, Arizona (pop. 581,562) estimates that the elimination of "compensatory time" will result in an additional annual increased expenditure of $100,000.

67. Owing to the burdensome requirements of the 1974 Amendments, Tulsa, Oklahoma (pop. 331,638) estimates additional costs in its fire department at $126,700 for 1976 and $380,600 additional cost in 1977.

68. Owing to the burdensome requirements of the 1974 Amendments, Sunnyvale, California (pop. 75,408) estimates that additional costs for its public safety personnel overtime will be $169,000 for 1975, $186,000 for 1976 and over $204,000 for 1977.

69. Owing to the burdensome requirements of the 1974 Amendments, Corcoran, California (pop. 5,249) estimates a $49,000 per year increase to all City functions and that it must reduce training time and ambulance services.

70. Owing to the burdensome requirements of the 1974 Amendments, Columbia, South Carolina (pop. 113,542) estimates that by 1976 its fire protection salary budget will have to be increased by $110,000 in order to merely continue the service presently provided. Furthermore, since under the proposed Regulation (§ 553.6 intended to be effective on January 1, 1975) all job related training is compensable, and since training programs are difficult to arrange during scheduled work

hours for these departments, decreased in-service training is a likely result. Such decrease is just as damaging in the long run, and mitigates efficiency of police and fire services just as much, as an outright decrease in service.

71. Owing to the burdensome requirements of the 1974 Amendments, Richmond, Virginia (pop. 249,621) estimates that the hiring of necessary additional firefighters in order to maintain present service and still be in compliance with the Act will cost the City an additional $161,000.

72. Owing to the burdensome requirements of the 1974 Amendments, Reidsville, North Carolina (pop. 13,636) estimates increased police protection costs of $33,567 next year representing an increase of over 10% of the total annual police salary expenditure, and increased fire protection costs of $30,635 next year representing an increase of over 15% of the total annual fire salary expenditure.

73. In meeting the increased cost of providing the same essential government services currently provided, which increased cost the 1974 Amendments to the Act impose on Plaintiff Metropolitan Government of Nashville and Davidson County, it is limited by Article II, section 9 of the Constitution of Tennessee, which prohibits municipal income, estate and inheritance taxes.

74. In meeting the increased cost of providing the same essential Government services as currently provided, which increased cost the 1974 Amendments to the Act impose on Plaintiff Arizona, Plaintiff Arizona is limited by Article 9, section 5 of the Constitution of Arizona, which limits State debt. Political subdivisions of Plaintiff Arizona are limited by Article 9, section 8 of the Constitution of Arizona to a debt of four per centum of

taxable property without a special election and, in any case, ten per centum of taxable property.

75. In meeting the increased cost of providing the same essential Government services as currently provided, which increased cost the 1974 Amendments to the Act impose on Plaintiff Lompoc, Plaintiff Lompoc is limited by Article XIII, section 40 of the Constitution of California, which prohibits a City or other municipal corporation from incurring debts in excess of revenue for the current year without a special election.

76. In meeting the increased cost of providing the same essential Government services as currently provided, which increased cost the 1974 Amendments to the Act impose on Plaintiff Salt Lake City, Plaintiff Salt Lake City is limited by Article XIV, section 3 of the Constitution of Utah, which provides that Cities and other municipal corporations may not incur debts in excess of taxes for the current year. Article XIV, section 4 of the Constitution of Utah prohibits taxation by Cities and other municipal corporations in excess of four per centum of the value of taxable property.

77. In meeting the increased cost of providing the same essential Government services as currently provided, which increased cost the 1974 Amendments to the Act impose on Plaintiff Cape Girardeau, Plaintiff Cape Girardeau is limited by Article 6, section 26 of the Constitution of 1945 of Missouri, which prohibits Cities and political subdivisions of the State from incurring debts in excess of revenues for the current year, without a special election. Article 6, section 26(b) of the Constitution of 1945 of Missouri limits the excess of debt over revenue to five per centum of the value of taxable tangible property, even following such a special election.

78. Plaintiffs States, political subdivisions and Cities are and will be required by the 1974 Amendments to the Act to alter work schedules and other personnel policies of long standing and proven effectiveness, for no reasonable reason related to the effective provision of essential Government services to the people within Plaintiffs' jurisdictions. The only purpose to Plaintiffs for this alteration of schedules and policies is to minimize the overtime wages provided for under the Act as amended, so as to keep within budget law requirements.

79. Plaintiffs are further irreparably and immediately harmed in that § 16 of the Act imposes a $10,000 fine plus up to six months in prison for willful violations. Furthermore, any violation of § 6 or § 7 of the Act results in a civil liability of back pay plus an equal amount in liquidated damages. Thus, literally, each hour of the Act's application to Plaintiffs results in the potential of double damages in a suit under the Act.

80. The facts set forth herein demonstrate the irreparable harm imposed upon Plaintiffs for which Plaintiffs have no adequate remedy at law; Plaintiffs are entitled to a judgment adjudicating their rights and an injunction to prevent Defendant from enforcing this unconstitutional Act against Plaintiffs.

WHEREFORE, Plaintiffs demand judgment against Defendant, declaring the Fair Labor Standards Act as applied to States, Cities and political subdivisions of States to be unconstitutional and for the interlocutory, preliminary and permanent enjoining of Defendant from enforcing or attempting to enforce the Act against Plaintiffs or those situated similarly to Plaintiffs, and for

such other and additional relief as the facts alleged herein may warrant.

Respectfully submitted,

/s/ Charles S. Rhyne
Charles S. Rhyne
Rhyne & Rhyne
400 Hill Building
839 17th Street, N. W.
Washington, D. C. 20006

(202) 347-7992

Attorney for Plaintiffs

District of Washington, D. C.)
)

Allen E. Pritchard, Jr., being duly sworn, deposes and says that his business address is 1620 Eye Street, N.W., Washington, D.C., 20006; that he is Executive Vice President of National League of Cities, Plaintiff herein; and that he has read the foregoing Complaint and knows the contents thereof with respect to Cities and the National League of Cities; and that the same are true of his own knowledge.

/s/ Allen E. Pritchard, Jr.
Allen E. Pritchard, Jr.

Charles A Byrley, being duly sworn, deposes and says that his business address is 1150 Seventeenth Street, N.W., Washington, D.C. 20036; that he is Executive Director of National Governors' Conference, Plaintiff herein; and that he has read the foregoing Complaint and knows the contents thereof with respect to States and the National Governors' Conference; and that the same are true of his own knowledge.

/s/ Charles A. Byrley
Charles A. Byrley

Sworn and subscribed before me
this 12th day of December, 1974.

/s/ Daphne G. Rimmer
Notary Public

My Commission Expires March 31, 1977

Amended Paragraph 39 of the Complaint of National League of Cities *et al.*

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

THE NATIONAL LEAGUE OF CITIES, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 74-1812
THE HONORABLE PETER J. BRENNAN, Secretary of Labor,	)	
Defendant.	)	

AMENDED PARAGRAPH 39 OF COMPLAINT

The Act and its Regulations are confusing, complicated, inequitable and so vague and incomprehensible as applied to State and City employees as to violate the Due Process Clause of the Fifth Amendment of the Constitution of the United States. Furthermore, the Regulations to be effective January 1, 1975 violate the Fifth Amendment specifically because they fail to give adequate notice of conduct to be proscribed or the requirements necessary to come into compliance with the Act, as a result of their being issued in final form on December 20, 1974. Said Act and Regulations do not improve State and City personnel, or the services they render, and in many respects are irreparably damaging as they cause enormous expenses

and, at the same time, a lessening of service. Existing State law, City Charter and ordinance provisions have been developed and adopted over the years to meet the unique situation of each State and City; and their laws, Charters and provisions are fair, reasonable and devoid of the problems and damage caused by the Act and the proposed Regulations thereunder.

[Certificate omitted in printing]

Complaint in Intervention of the State of California

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

THE NATIONAL LEAGUE OF CITIES,
an Illinois Corporation, on
behalf of its member cities,
1620 Eye Street, N.W.,
Washington, D.C. 20006,

THE NATIONAL GOVERNORS'
CONFERENCE,
a District of Columbia Corporation,
on behalf of its members,
1150 Seventeenth Street, N.W.,
Washington, D.C. 20036,

The State of ARIZONA
N. Warner Lee, Attorney General
State Capitol
Phoenix, Arizona 85007,

METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON
COUNTY, Tennessee
Milton H. Sitton, Director of Law
204 Courthouse
Nashville, Tennessee 37201,

The City of SALT LAKE CITY, Utah
Roger F. Cutler, City Attorney
101 City and County Building
Salt Lake City, Utah 84114,

The City of LOMPOC, California
Alan Davidson, City Attorney
119 West Walnut Avenue
Lompoc, California 93436,

The City of CAPE GIRARDEAU, Missouri
Thomas Utterback, City Attorney
Office of the City Attorney
Cape Girardeau, Missouri 63701,

Plaintiffs,

and

THE STATE OF CALIFORNIA,
State Capitol,
Sacramento, California 95814

by and through

EVELLE J. YOUNGER,
Attorney General, on
behalf of the People of
the State of California,

RONALD REAGAN,
Governor

VERNE ORR,
Director, Department of Finance

JAMES G. STEARNS
Secretary, Agriculture
and Services Agency

) Civil Action
) No. 74-1812

FRANK J. WALTON,
Secretary, Business
and Transportation Agency

NORMAN B. LIVERMORE, JR.
Secretary
Resources Agency

JAMES E. JENKINS
Secretary, Health and
Welfare Agency,

Plaintiffs-Intervenors,

v.

The Honorable PETER J. BRENNAN
Secretary of Labor
of the United States,

Defendant.

COMPLAINT IN INTERVENTION FOR DECLARATORY JUDGMENT THAT THE 1974 AMENDMENTS TO THE FAIR LABOR STANDARDS ACT UNCONSTITUTIONALLY ATTEMPT TO REGULATE ESSENTIAL STATE AND LOCAL GOVERNMENT FUNCTIONS, AND FOR PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF.

Intervenors allege:

1. This action arises under the Fair Labor Standards Act (hereinafter sometimes "Act"), 52 Stat. 1060, as amended, 29 U.S.C. § 201 *et seq.* This Court has jurisdiction, as this is an action relating to commerce, under 28 U.S.C. § 1337.

2. This action further arises under the Constitution of the United States and the Fifth, Tenth, and Eleventh Amendments to the Constitution of the United States. The matter in controversy, exclusive of interests and costs, exceeds the sum of ten thousand dollars; this Court has jurisdiction under 28 U.S.C. § 1331. Jurisdiction is also based on § 1346 of Title 28, United States Code, which provides that the District Courts shall have original jurisdiction of any other civil action founded either upon the Constitution or any act of Congress; and on the Federal Declaratory Judgment Act (28 U.S.C. §§ 2201, 2202) and the laws of the United States of America.

3. Public Law 93-259, 88 Stat. 55 amending 29 U.S.C. § 201 *et seq.*, (hereinafter somes "1974 Amendments") became effective on May 1, 1974. Provisions of the 1974 Amendments to the Act relating to police and fire protection personnel become effective on January 1, 1975. Plaintiffs challenge specifically the constitutionality of the following provisions of the Act as

amended: in § 3(d), the definition of "employer" is amended to include a "Public Agency"; in § 3(e)(2), the definition of "employee" is amended to exclude in the case where the employer is a State public agency, only persons who are (1) not subject to a State's civil service laws and (2) publicly elected, or member of the personnel staff, or policy making appointee, or immediate legal advisor of one publicly elected; in § 3(h), the definition of "industry" is amended to include "other activity" in addition to the original trade business or industry language; in § 3(r), the definition of "enterprise" is amended to include within the activities deemed to be performed for a business purpose, those activities performed by any person in connection with the activities of a public agency; in § 3(s), the definition of "Enterprise engaged in commerce or in the production of goods for commerce" is amended to include an activity of a public agency and to state that, "The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling or otherwise working on goods or materials that have been moved in or produced for commerce"; in § 3(x), "public agency" is defined to include: "the Government of a State or political subdivision thereof; any agency of . . . a State or political subdivision of a State; or any interstate governmental agency"; in § 6(b), specific rates of compensation are provided for newly covered employees; in § 7(k), a limited and diminishing exemption for police and fire protection employees is created, which exemption is also stated in § 13(b)(20); both § 7(k) and § 13(b)(20) become effective January 1, 1975; in § 13(b)(7) the

former overtime exemption for local transit companies, now including publicly owned transit companies, doing an annual business of less than $250,000 is to be phased out by May 1, 1976; in § 16(b), State employees are granted a cause of action against a public agency in "any Federal or State court of competent jurisdiction"; in § 16(c), the Secretary of Labor is authorized to bring an action for both liquidated damages and back pay on behalf of an employee subject to certain conditions.

4. Section 15 of the Act lists the prohibited acts as violations of §§ 6, 7, 11, 12 or any regulations issued by the Secretary pursuant to his rulemaking powers under § 14.

5. Plaintiff State of California is a sovereign State of the United States of America. Acting in its sovereign governmental capacity, it performs essential functions which are necessary and indispensable to its existence as a sovereign State; said functions are required to be performed under its own Constitution and laws and under the Constitution and laws of the United States. Its unique needs and the needs of its residents for essential governmental services are distinct from those of each of the other United States. Its government structure, geography, climate, topography and demography require unique policy and personnel management decisions which in many respects differ from those made by the other states of the United States. The State of California is not in competition with any of the other states, or with any private enterprise, when making these decisions or performing these essential governmental functions. California's decisions are made through a republican form of government, by the votes of its citizens in elections conducted under its Constitution. It does not have the

power, absent agreement, to enforce or effectuate its decisions beyond its own borders into any other state.

6. Plaintiff Evelle J. Younger, Attorney General of the State of California, is the chief law enforcement officer of the State of California pursuant to Article V, Section 13 of the California Constitution, and brings this action in the name of the People of the State of California. The Attorney General possesses not only extensive statutory powers but also broad powers derived from the common law relative to the protection of the public interest, and has the power to file any civil action or proceeding in the federal courts directly involving the rights and interests of the State of California, or which the Attorney General deems necessary for the enforcement of the laws of the State, the preservation of order, and the protection of public rights and interests. It is the concern and interest of the People of the State of California that State laws and legislative policies, including the State Civil Service Act (California Government Code, Title 2, Division 5, Section 18000, *et seq.*) and pertinent sections of the California Constitution (Article XXIV), be enforced.

7. Plaintiff Ronald Reagan is the duly elected and acting Governor of the State of California and is charged by Article V, Section 1 of the California Constitution to faithfully execute the laws of said State. Plaintiff Verne Orr is the duly-appointed Director of the Department of Finance of the State of California and as such has the power and the duty to supervise the fiscal and business policies of the State, and particularly to certify that funds for wages and salaries to be paid to State employees are in accordance with current budgeting provisions. Plaintiff Frank J. Walton is the

duly-appointed Secretary of the Business and Transportation Agency. Plaintiff Norman B. Livermore, Jr. is the duly-appointed Secretary of the Resources Agency of the State of California. Plaintiff James E. Jenkins is the duly-appointed Secretary of the Health and Welfare Agency of the State of California. Plaintiff James G. Stearns is the duly-appointed Secretary of the Agriculture and Services Agency of the State of California. Each of the four foregoing Agency Secretaries are vested with the duty and responsibility of advising and directing the many and various State departmental programs which fall within the respective jurisdiction of each Agency Secretary.

8. Plaintiff National League of Cities has as members over 15,000 Cities who have over 2,000,000 employees. These Cities are political subdivisions of the 50 States. The National League of Cities also has as members State municipal leagues, which leagues also have as members Cities who are political subdivisions of States. The National League of Cities is owned and operated by its member Cities and State municipal leagues, with said State leagues in turn being owned and operated by the leagues' member Cities in each State. The member Cities and State leagues govern the National League of Cities through an elected Board of Directors. The National League of Cities brings this action on its behalf and on behalf of each of its member Cities. Article I of its bylaws state its function as *inter alia*, "the adoption of a national municipal policy and its implementation as the chief vehicle for the development of effective municipal government."

9. Plaintiff National Governors' Conference is a non-profit organization incorporated on April 2, 1974,

under the laws of the District of Columbia. The Conference was originally organized in 1908. Its membership is composed of the Governors of the several States of the United States, the Virgin Islands, Guam, American Samoa and the Commonwealth of Puerto Rico. As listed in Article II of its Articles of Organization, the Conference is established *inter alia*: "to vigorously represent the interests of the states in the Federal system". The Conference brings this action on its own behalf and on behalf of its members.

10. Plaintiff Arizona is one of the fifty sovereign States of the United States. Acting in its sovereign governmental capacity, it performs essential functions which are necessary and indispensable to its existence as a sovereign State and which are required to be performed under its own Constitution and laws and under the Constitution and laws of the United States. Its unique needs and the needs of its residents for essential governmental services are distinct from those of each of the other United States. Its Government structure, geography, climate, topography and demography require unique policy and personnel management decisions which in many respects differ from those made by the other States of the United States. It is not in competition with any of the other States or any private enterprise when making these decisions or performing these essential governmental functions. Arizona's decisions are made through a republican form of Government, by the votes of its citizens in elections conducted under its Constitution. It does not have the power, absent agreement, to enforce or effectuate its decisions beyond its own borders into any other State.

11. Plaintiff Metropolitan Nashville (pop. 447,877), a member of Plaintiff National League of Cities, is a

metropolitan Government consisting of the City of Nashville and Davidson County established under the laws of the State of Tennessee. As a political subdivision of Tennessee, it shares in that State's sovereignty and performs essential functions which are necessary and indispensable to its existence as a political subdivision of Tennessee and which are required to be performed under its charter and ordinances, the Constitution and laws of Tennessee, and the Constitution and laws of the United States. Its unique needs and the needs of its residents for essential governmental services vary from the needs of other political subdivisions within Tennessee and are distinct from the needs of political subdivisions of each of the other United States. Its Government structure, geography, climate, topography and demography require unique policy and personnel management decisions which may vary from those of other political subdivisions within Tennessee and which in many respects differ from those made by political subdivisions of the other United States. It is not in competition with any other political subdivisions within or without Tennessee or any private enterprise when making these decisions or performing these essential functions. Instead, it acts through the republican form of its State Government in conjunction with its own municipal Government, through officials elected by the votes of its citizens. It does not have the power, absent agreement, to enforce or effectuate its decisions beyond its State-designated jurisdictional boundaries and beyond the Tennessee borders into any other State.

12. Plaintiff Salt Lake City (pop. 175,885), a member of Plaintiff National League of Cities, is a City established under the laws of the State of Utah. As a political subdivision of Utah, it shares in that State's sovereignty

and performs essential functions which are necessary and indispensable to its existence as a political subdivision of Utah and which are required to be performed under its own laws, the Constitution and laws of Utah, and the Constitution and laws of the United States. Its unique needs and the needs of its residents for essential governmental services vary from the needs of other political subdivisions within Utah and are distinct from the needs of political subdivisions of each of the other United States. Its Government structure, geography, climate, topography and demography require unique policy and personnel management decisions which vary from those of other political subdivisions within Utah and which in many respects differ from those made by political subdivisions of the other United States. It is not in competition with any other political subdivisions within or without Utah or any private enterprise when making these decisions or performing these essential functions. Instead, its decisions are made through the republican form of its State Government in conjunction with its own municipal Government, by those elected by the votes of its citizens. It does not have the power, absent agreement, to enforce or effectuate its decisions beyond its State-designated jurisdictional boundaries and beyond the Utah borders into any other State.

13. Plaintiff Lompoc (pop. 25,600), a member of Plaintiff National League of Cities through membership in the League of California Cities, is a City established under the laws of the State of California. As a political subdivision of California, it shares in that State's sovereignty and performs essential functions which are necessary and indispensable to its

existence as a political subdivision of California and which are required to be performed under its own laws, the Constitution and laws of California, and the Constitution and laws of the United States. Its unique needs and the needs of its residents for essential governmental services vary from those of other political subdivisions within California and are distinct from the needs of political subdivisions of each of the other United States. Its Government structure, geography, climate, topography and demography require unique policy and personnel management decisions which vary from those of other political subdivisions within California and which in many respects differ from those made by political subdivisions of the other United States. It is not in competition with any other political subdivisions within or without California or any private enterprise when making these decisions or performing these essential functions. Instead, its decisions are made through the republican form of its State Government in conjunction with its own municipal Government officials elected by the votes of its citizens. It does not have the power, absent agreement, to enforce or effectuate its decisions beyond its State-designated jurisdictional boundaries and beyond the California borders into any other State.

14. Plaintiff Cape Girardeau (pop 31,282), a member of Plaintiff National League of Cities, is a City established under the laws of the State of Missouri. As a political subdivision of Missouri, it shares in that State's sovereignty and performs essential functions which are necessary and indispensable to its existence as a political subdivision of Missouri and which are required to be

performed under its own laws, the Constitution and laws of Missouri, and the Constitution and laws of the United States. Its unique needs and the needs of its residents for essential governmental services vary from the needs of other political subdivisions within Missouri and are distinct from the needs of political subdivisions of each of the other United States. Its Government structure, geography, climate, topography and demography require unique policy and personnel management decisions which vary from those of other political subdivisions within Missouri and which in many respects differ from those made by political subdivisions of the other United States. It is not in competition with any other political subdivisions within or without Missouri or any private enterprise when making these decisions or performing these essential functions. Instead, it is governed through the republican form of its State Government in conjunction with its own municipal Government by the officials elected by the votes of its citizens. It does not have the power, absent agreement, to enforce or effectuate its decisions beyond its State-designated jurisdictional boundaries and beyond the Missouri borders into any other State.

15. Defendant, Peter J. Brennan, is the Secretary of Labor of the United States, who is charged by law with the implementation and enforcement of the Act.

16. The City of Cape Girardeau, Missouri, has officially stated in a letter to Defendant's Regional Solicitor of Labor, dated October 15, 1974, that it will not comply with the 1974 Amendments, because the Act is unconstitutional. It will not therefore make itself available for Federal audits or inspections of any kind by

Defendant.

17. On November 20, 1974, Defendant herein notified Plaintiff herein, the City of Cape Girardeau, of a civil action to be filed imminently against Cape Girardeau in the United States District Court for the Eastern District of Missouri, Southeastern Division, alleging violation by Cape Girardeau of §§ 6(b) and 15(a) (2) of the Act and demanding an injunction forcing Cape Girardeau to pay the overtime compensation required under the Act.

18. The City of Lompoc, California, after exchange of correspondence with the agent of Defendant herein, the Chief of the Division of Minimum Wage and Hours Standards of the Department of Labor, and a determination by Defendant and his agent that 29 C.F.R. § 778 prohibiting the use of compensatory time off beyond the work period applied to State and local Government, has indicated by its City Attorney the decision to continue the practice of awarding compensatory time off under existing local law and procedures on the bases that, (1) the Act itself does not prohibit the use of compensatory time off and, (2) the Act, being unconstitutional, cannot invalidate said practice.

19. Plaintiffs States and Cities provide the following essential Government services, among others, each of which will be affected in cost or quality, or both, by the 1974 Amendments to the Act: police protection services; fire protection services; highway repair and snow removal services; trash collection, sewage treatment and other sanitation and health services; park maintenance and other recreational services; libraries; state and local administrative and regulatory agencies which enforce laws

and regulations preserving the public health, safety and welfare, including inspection of buildings, licensing of occupations and businesses, administration of public assistance in emergency and poverty situations, preservation of environmental quality, administration of election, legislative, executive and judicial processes, administration of regulations preserving both public order and free expression of views and information, protection of the public against fraud and sharp practice; non-elected, non-appointed personnel such as tax collectors involved in non-competitive governmental functions which are done or can only be done exclusively by Government. In providing these essential Government services, Plaintiffs extensively use voluntary boards and commissions, whose members are not compensated, or who are paid nominal compensation. The Act makes use of these voluntary boards, commissions and workers financially impossible.

20. These said essential Government services inhere in the existence of States and their political subdivisions. Without these essential Government services a State could not exist for the protection and benefit of the people within the territory of the State.

21. States and Cities, as political subdivisions of a State, cannot fail or refuse to provide these essential Government services consistently with provisions of State Constitutions, laws, charters, ordinance provisions and provisions of the United States Constitution.

22. Plaintiffs States and Cities have exercised their sovereign judgment in establishing personnel policies which will insure the most effective provision of essential Government services at the least cost to the

taxpayers of Plaintiffs, consistently with fairness in compensating and regulating the working hours and conditions of the employees of Plaintiffs who provide essential Government services.

23. Under the Tenth Amendment of the Constitution of the United States one of the most vital sovereign powers reserved to the States is the power to employ personnel to carry out essential governmental functions and to completely control by rules, regulations and orders the performance of said employees in carrying out said essential governmental functions.

24. States and Cities have developed law on personnel, including civil service laws, designed to take care of the unique governmental situation of each State and each City as to industry, weather, and similar considerations. The Act, and its regulations, purport to nullify such State and local legislation and impose uniform nationwide Federal rules and Regulations for all State and City personnel. For this imposition there is no rational basis.

25. Plaintiff State of California operates under California constitutional and statutory provisions providing essential and indispensable governmental services through its State employees. Appropriation of tax revenues necessary to fund the wages and salaries of California State employees is a legislative power (Cal. Const., Art. IV, § 1), and the authority to appropriate said monies resides with the California State Legislature (Cal. Const., Art. III); neither the State salary-fixing administrative authority (the California State Personnel Board), the executive branch, nor the judiciary, has the power to compel such legislative appropriation of money. *California State Emp. Association* v. *Flournoy*, 32 Cal. App. 3d 219, 234-235; 108 Cal.Rptr. 251 (1973);

California State Emp. Association v. *State of California*, 32 Cal.App.3d 104, 109; 108 Cal.Rptr. 60 (1973).

California State employees are appointed and promoted under a general system based on merit ascertained by competitive examination (Cal. Const., Art. XXIV), and are governed exclusively by the State Civil Service Act (Title 2, Cal. Govt. Code, Division 5, § 18000, *et seq*.) relative to appropriate hours, working conditions, and other matters concerning their State employment. Among its many comprehensive provisions, the State Civil Service Act provides:

a. That the policy of the State is that the workweek of the State employee shall be 40 hours, except to meet the varying needs of different State agencies; that the policy of the State is to avoid the necessity for overtime work whenever possible (Govt. Code, § 18020); that the State Personnel Board, when considering prevailing practice concerning overtime compensation may establish workweek groups of the same or different lengths with different methods of recognizing or providing compensation for overtime (*Ibid*., § 18021); that either cash compensation (at 1 1/2 times the regular rate of pay) or compensatory time off (at 1 1/2 times each hour of overtime worked) may be provided by the State Personnel Board (*Ibid*., § 18021.5); that the State should comply with those provisions of the Fair Labor Standards Act which the United States Supreme Court has found constitutional as applied to the sovereign states (*Ibid*., § 18021.6);

b. That the normal workweek of permanent employees in fire suppression classes shall not exceed 84 hours per week; work in excess of 84 hours may be compensated in cash or compensating time off (*Ibid*., §

18021.7); that compensating time off may be granted within twelve calendar months following the month in which the overtime was worked (*Ibid.*, § 18023); that the State Personnel Board may provide for rates or methods of compensation for overtime work, and in so doing shall consider the needs of State service and prevailing practice in private business and other public employment (*Ibid.*, § 18026);

c. That all provisions of the State Workmen's Compensation Law shall apply to all "firemen" of the State, whether such employees are partly paid, fully paid, or volunteers (*Ibid.*, §§ 18300, 18301, 18302);

d. That to secure substantial justice and equality in the State civil service, the State Personnel Board may provide by rule for days, hours, and conditions of work, taking into consideration the varying needs and requirements of the different State agencies and prevailing practices for comparable services in other public employment and in private business (*Ibid.*, § 18705);

e. That the State Personnel Board shall establish and adjust salary ranges for each class of position in the State civil service, based on the principle that like salaries shall be paid for comparable duties and responsibilities; the Board shall make no adjustments which require expenditures in excess of existing appropriations which may be used for salary increase purposes (*Ibid.*, § 18850); that in classes and positions with unusual conditions or hours of work or where necessary to meet prevailing rates and practices for comparable services in other public employment and in private business the State Personnel Board may establish more than one salary range for rate or method of compensation within a class

(*Ibid.*, § 18852); that automatic salary adjustments shall be made for employees in the State civil service unless there is not sufficient money available for that purpose in the appropriation for which such salaries are to be paid (*Ibid.*, § 18856);

f. That pursuant to the rules and regulations of the California State Personnel Board (Title 2, Calif. Adm. Code, Section 1, *et seq.*) the qualifying monthly pay period is a calendar month (*Ibid.*, §§ 6.1, 6.2); that in order to be compensable by cash or compensating time off, such overtime must be authorized in advance except in emergencies, and subsequently authorized in writing not later than ten days after the end of the pay period during which the overtime was worked (*Ibid.*, § 131); that the time when compensating time off may be taken is at the discretion of the appointing agency (*Ibid.*, § 134), and if the employee fails to take such compensating time off at the designated time, he shall have waived his right to compensation for such overtime (*Ibid.*, § 134); that both "in service training" and "out service training", and the conditions for the receipt of salary, tuition, or other necessary expenses therefor, are governed by regulations of the State Personnel Board (*Ibid.*, § 530, *et seq.*).

26. Plaintiff State of Arizona operates under Arizona constitutional and law provisions providing essential Government services, and in performing other functions, through its State and City employees. These law provisions include: a minimum wage for minors which applies to employment in "any industry, trade, business or branch thereof", Ariz. Rev. Stat. §§ 23–311-29 (1974 Supp.); a requirement that each City or town of more than seven thousand inhabitants, having a salaried police

and fire department, pay a minimum wage to every foot patrolman and horseman after the third year of employment, Ariz. Rev. Stat. § 9-902 (1965); a constitutional provision defining a lawful day's work in all employment by, or on behalf of, the State or any of its political subdivisions. Ariz. Const. Art. XVIII, § 1; *State* v. *Boykin*, 109 Ariz. 289, 508 P. 2d 1151 (1973); legislation providing overtime compensation for work by public employees performing manual or mechanical labor, Ariz. Rev. Stat. § 23-391 (1974 Supp.).

27. Plaintiff City of Salt Lake operates under Utah State constitutional and law provisions in providing essential governmental services, and in performing other functions, through its employees. These law provisions include: a minimum wage provision for women and minors, an industrial commission to oversee wages and working conditions and to set maximum hours, a wage board made up of industry and employee representatives to determine the minimum wage, Utah Code, § 34–22-5 *et seq*. (Supp. 1973); a constitutional provision defining a day's work on all works or undertakings carried on or aided by the State, County or Municipal Governments, Utah Const. Art. XVI, § 6; a requirement that State and local Government employees working on the construction of public works excluding maintenance work, must be paid the general prevailing wage rate for work of a similar character in the locality, Utah Code, § 34–30-2 (Supp. 1973), and a provision for overtime compensation, Utah Code, § 34–30-8 (Supp. 1973).

28. Plaintiff Metropolitan Government of Nashville and Davidson County operates under the Tennessee State laws in providing essential governmental services, and in performing all other functions, through its employees.

These laws include a provision making it unlawful for any "person, firm, corporation or association of any kind" to deny employment because of affiliation with a labor organization, Tenn. Code § 50-208 (1956).

29. Plaintiff City of Cape Girardeau operates under Missouri State laws in providing essential governmental services and in performing other functions through its employees. These laws include a provision regulating child labor, Vern. Ann. Mo. Stat., § 294.011 *et seq.* (1971); regulation of wages on public works, requiring that those employed in the construction of public works, including highways, must be paid the prevailing hourly rate for work of a similar character in the locality in which the work is performed, Vern. Ann. Mo. Stat., § 290.210 *et seq*. (1971), as amended (Supp. 1974); laws regulating police and firemen hours, Vern. Ann. Mo. Stat., §§ 85.290, 85.100 (1971); a provision allowing with certain exceptions State and local Government employees to join labor organizations and bargain collectively, Vern. Ann. Mo. Stat., § 105.500 *et seq.* (Supp. 1974); a provision that, with respect to firefighters, a firemen's arbitration board will be appointed, at the request of either the employees or the governing body, to resolve disputes over wages, hours, and conditions of employment, Vern. Ann. Mo. Stat., § 290.350 *et seq.* (1971).

30. Plaintiff City of Lompoc operates under California State laws in providing essential governmental services, and in performing other functions through its employees. These law provisions include a minimum wage law applicable to persons "employed in any occupation, trade or industry" establishing an industrial commission to

determine whether wages in any occupation are inadequate to supply the cost of living and commission representatives to determine the appropriate minimum wage, Cal. Labor Code, §§ 1171-1199 (Deering Supp. 1974); provisions defining the workweek of the State employee, and authorizing the State personnel board to provide overtime compensation for State employees, Cal. Govt. Code, §§ 18020, 18021.5 (Deering 1973); specific statutes granting State and local firefighters the right to join labor organizations and bargain collectively, Cal. Labor Code, §§ 1960-1962 (Deering 1964); statutes which grant State employees and employees of public agencies the right to join labor organizations and bargain collectively, requiring that the State and other public employers confer with employee representatives, and provide for mediation of unresolved disputes through either local procedures or through the Department of Industrial Relations, Cal. Govt. Code, §§ 3500-10, 3525-36 (Deering 1973).

31. In programs developed by experience for the most efficient fulfilling of responsibilities to their citizens and others within their territory, Plaintiffs have implemented the use of compensatory time off, which under the 1974 Amendments to the Act, Plaintiffs would no longer be able to maintain. Compensatory time off is the payment of overtime in the form of paid time off at some future date convenient to both employer and employee. It allows the employee to have more freedom to choose his time off and more time off. It avoids demeaning and wasteful "make-work" projects during slow periods. It allows the employer to most efficiently deal with many areas of Government which involve "peak" employment problems. It has been enthusiastically supported by

employees who welcome the flexible approach it represents, and its invalidation under the 1974 Amendments has created severe morale problems.

32. In programs developed by experience for the most efficient fulfilling of responsibilities to their citizens and others within their territory, Plaintiffs have implemented the use of paid volunteers, which under the 1974 Amendments to the Act, Plaintiffs would no longer be able to maintain. Paid volunteers are compensated on a per-job or monthly fee basis constituting a nominal stipend for the work done. Many States and Cities pay paid volunteers a wage sufficient only to make these employees eligible for workmen's compensation under State laws. This practice is most prevalent in police and fire protection services. Under Defendant's proposed Regulations for police and fire personnel, § 553.10, intended to be effective January 1, 1975, any stipend beyond reimbursement of out-of-pocket expenses, and other limited exceptions destroys the volunteer status and subjects the policeman or fireman to the Act. This will seriously curtail service now provided by the numerous small, independent volunteer fire departments across the country. The practice of paid volunteers is similarly employed, and will result in similar added expense or diminution of service in areas such as poll workers in elections, and parks, recreation and government projects for involvement of the young, elderly and disadvantaged in the community.

33. In programs developed by experience for the most efficient fulfilling of responsibilities to their citizens and others within their territory, Plaintiffs have implemented the use of joint employment, which under the 1974

Amendments to the Act, Plaintiffs would no longer be able to maintain. Joint employment is the employment of personnel in more than one capacity within the State and City Government, whereby many full-time workers augment their income by part-time jobs in other areas of Government employment. Under Defendant's proposed Regulations for police and fire personnel, § 553.8, intended to be effective January 1, 1975, if the part-time employment involves activities other than police and fire protection, it is possible to lose the exemption provided in § 7(k) of the Act, subjecting police and firefighters to the 40 hour week required by § 7(a). In areas other than police and fire protection, all hours worked for the State or political subdivision, regardless of which agency or department, must be counted towards the hours worked for that week. The requirement of the Act to pay overtime rates for part-time jointly employed personnel will force the end of this practice, which has been beneficial to employer and employee alike.

34. In programs developed by experience for the most efficient fulfilling of responsibilities to their citizens and others within their territory, Plaintiffs have implemented the use of mutual aid police and fire agreements, which under the 1974 Amendments to the Act, Plaintiffs will no longer be able to maintain. Mutual aid agreements allow the pooling of police or fire protection during emergencies or disasters which by their immediacy and gravity are too large for a single agency to combat. The participating agencies generally do not charge for the aid rendered during such emergencies and disasters. However, under Defendant's proposed Regulations for police and

fire personnel, § 553.9, intended to be effective January 1, 1975, all hours worked in aid of other jurisdictions must be counted towards hours worked in the home jurisdiction. This requirement forces the choice between abandoning these agreements, or massive unexpected overtime expenses whenever an emergency situation arises. These overtime expenses, by reason of their unpredictability, present a massive hidden liability which could itself bankrupt smaller political subdivisions.

35. In many other programs developed by experience for the most efficient fulfilling of responsibilities to their citizens and others within their territory, Plaintiffs have implemented the use of employment policies other than those described in the foregoing paragraphs which under the 1974 Amendments to the Act, Plaintiffs would no longer be able to maintain.

36. The Fair Labor Standards Act was enacted in 1938 and has been amended in 1940, 1949, 1955, 1956, 1961, 1963, 1965, 1966, 1972 and 1974. Under the original Act and under amendments prior to the 1966 Amendments, Plaintiffs States and Cities were specifically and unqualifiedly exempted from the Act. The 1974 Amendments, 88 Stat. 55, in express terms include Plaintiffs under the definition of "public agency".

37. The 1974 Amendments to the Act, subject Plaintiff States and Cities to hundreds of rules, Regulations and interpretations allegedly implementing the Act (29 C.F.R., sections 500-1899) and these rules, Regulations and interpretations are now applicable to the newly covered State and local employees. The most recent proposed addition to this volume of Regulations

are proposed rules pertaining to "Employees of Public Agencies Engaged in Fire Protection or Law Enforcement Activity (Including Security Personnel in Correctional Institutions)", 39 Fed. Reg. 38663-66 (1974).

38. In addition, Plaintiffs are subject to Opinion Letters of the Wage and Hour Division of the Department of Labor, many of which have been issued to date dealing with the extended coverage to State and local employees. Examples are: Opinion Letter No. 1325, stating that full-time student employees of a public library are not eligible under § 14 of the Act for wage payment at 85% of the minimum wage as employees of a retail or service establishment, since a library is engaged in the cultural improvement of a community, "a purpose entirely foreign to the accepted understanding of a 'retail' activity"; Opinion Letter No. 1328, stating that beaches operated by a municipal government are not seasonal industries under § 7(c) of the Act; Opinion Letter No. 1331, reiterating the narrow terms of the exemption for employees in the legislative branch of a State Government, stating that employees can be excluded from the Act's coverage only if outside the civil service laws of the governmental jurisdiction involved, and meeting one of the other requirements under § 3(e)(2)(c)(ii) and stating four criteria, also set out to determine if an employee "is selected by the holder of such an office to be a member of his personal staff" or "is appointed by such an officeholder to serve on a policymaking level" under § 3(e)(2)(c)(ii)(II) and (III) of the Act; Opinion Letter No. 1334, setting requirements counting volunteer time for city projects toward hours worked; Opinion Letter No. 1336, exempting petit and grand jurors from coverage under the Act.

39. If constitutional, the Act conflicts with and replaces, by its hundreds of rules and Regulations, the State constitutional, and statutory provisions governing State and City personnel and civil services. The Act also replaces City Charter and ordinance provisions governing personnel and civil service.

40. The Act changes control of State and City employees from States and Cities to Federal control. For the first time in 200 years the Federal Government is claiming constitutional power to thus take over control of this vital internal Government function of States and Cities. The Federal Government's claim of constitutional power to impose employee age, wage, hour, and other personnel controls upon States and Cities is of such sweeping character as to effectively take over control not only of State and City personnel but of State and City budgets because personnel costs are usually a major item in said budgets. No more vital internal function of government exists for States and Cities than control of their employees and the budget items relating to said employees.

41. Unconstitutional interference with the sovereign governmental functions and internal affairs of Plaintiffs occurs through the claim by Defendant of power under the Act to impose upon Plaintiffs a vast number of Regulations, rules, interpretations and decisions issued by Defendant covering employee relations of Plaintiffs and requiring the making, keeping and preservation by Plaintiffs of vast amounts of specified records for numerous inspections by Defendant's enforcement and administrative officials.

42. The Act, Regulations promulgated thereunder and Opinions construing the Act, place Plaintiffs, and all States, political subdivisions and Cities under a massive burden of numerous Federal officers and employees, and remove ultimate control of State and local Government personnel services from States and localities and place that ultimate control in Defendant in Washington, D.C.

43. The Act and its Regulations are confusing, complicated, inequitable and so vague and incomprehensible as applied to State and City employees as to violate the Due Process Clause of the Fifth Amendment of the Constitution of the United States. Said Act and Regulations do not improve State and City personnel, or the services they render, and in many respects are irreparably damaging as they cause enormous expenses and, at the same time, a lessening of service. Existing State law, City Charter and ordinance provisions have been developed and adopted over the years to meet the unique situation of each State and City; and their laws, Charters and provisions are fair, reasonable and devoid of the problems and damage caused by the Act and the proposed Regulations thereunder.

44. The imposing of the Act's provisions and the implementing thereof by Defendant, and the Federal officers and employees acting under his direction and supervision, in replacement of State and City personnel law and State and City implementing officers and employees casts a vast unreasonable burden upon States and Cities. This damaging burden has no rational relation to commerce among the States and cannot be constitutionally based upon the Commerce Clause of the Constitution of the United States, and is in addition a direct violation of the Tenth Amendment of the Constitution of the United States.

45. The 1974 Amendments to the Act have caused and will cause to Plaintiffs irreparable injury and damage, and will irreparably injure and damage all Cities and States situated similarly to Plaintiffs, as described herein. The 1974 Amendments to the Act will require Plaintiffs, States, political subdivisions and Cities to meet enormously increased costs in providing the same essential Government services provided presently. The ability of Plaintiffs to meet these increased costs, which will not be accompanied by increases in the services provided, is circumscribed by some State constitutional provisions limiting taxes and debts, the purpose of which is to safeguard the fiscal integrity of Plaintiffs States and Cities, for the benefit of the citizens thereof.

46. The 1974 Amendments to the Act will force Plaintiffs to forego planned new Government services, owing to the greatly increased cost of providing current or reduced essential Government services, said increased costs arising out of inflexible provisions of the Act rather than out of increased total costs of salaries for all municipal services.

47. The 1974 Amendments to the Act will make it substantially more difficult for Plaintiffs State and Cities to get and keep qualified employees to provide essential Government services, owing to the Amendments' and Act's effective prohibition of the employment practices such as compensatory time off and joint employment alleged in the Complaint, *supra* which benefit employees of Plaintiffs.

48. The great diversity of State and local Governments makes full computation of the nationwide impact of these Amendments impossible. However, a recently

released International City Management Association (ICMA) study of fire protection services across the country provides a basis for determining the immense impact for that budget alone, which is but a fraction of each City's budget. The estimated 200,000 full-time paid firefighters constitute a conservatively estimated payroll of $2 billion annually. The extensive ICMA study indicates that there are three main groups of fire departments which will incur the most liability as a result of the Act: (1) those with an average number of hours per week greater than the 60 hours per week presently required (about 15% of the Cities sampled), (2) those with more than 28 days in their work periods (about 10% of those sampled), and (3) those who employ a pay back system whereby a fireman is paid for more hours than he works in each period but must pay back a certain number of shifts in a year (about 10% of those sampled). Allowing for overlap between these groups and calculating the average increase from the data gathered, the minimum impact for the first year on fire personnel budgets nationwide is estimated at a minimum of $200,000,000. By 1978 the estimated cumulative impact on fire personnel budgets is estimated to be $1 billion. This represents a 50% increase in fire protection costs after three years owing to the 1974 Amendments alone. Increased costs for other essential State and City governmental functions are reasonably certain to amount to billions of dollars per year due to the impact of these 1974 Amendments to the Act.

49. Plaintiff Metropolitan Government of Nashville and Davidson County has concluded that the 1974 Amendments to the Act will increase the cost of

providing only essential police and fire protection, with no increase in service provided, and no increase in salary levels, by $938,000 per year.

50. Furthermore, Plaintiff Metropolitan Government of Nashville and Davidson County, Tennessee, estimates that about 40% of its policemen work in joint employment relationships for the State and Metropolitan Government, as defined in Defendant's new proposed Regulations for police and fire personnel (§ 553.8, intended to be effective on January 1, 1975). These police officers average at least 16 hours a week in this employment. If the proposed rules become effective it is possible that the Metropolitan Government would have to pay overtime on this 16 hours a week, resulting in an overtime payment of $19,000 per week or a total of approximately $1 million per year. The alternative to this added liability is to curtail necessary services.

51. Plaintiff Lompoc, California, will suffer vast as yet inestimable increased costs if it were to comply with the Act with no increase in salary levels and no increase in services provided.

52. Plaintiff Cape Girardeau, Missouri, estimates the present annual fire department budget of $350,000 would have to be increased by another $250,000 to $400,000 per year in order to comply with the Act. This would translate as an increase from the present expenditure rate of 50 cents per $100 assessed valuation to 90 cents per $100 assessed valuation. The citizens of Cape Girardeau cannot comply with such a drastic immediate increase in the cost of their Government.

53. Plaintiff City of Salt Lake will suffer the following irreparable injury as a result of the 1974 Amendments:

the payment of time and one-half instead of compensatory time off for the more than 7000 overtime hours accumulated annually merely to provide necessary snow removal services; discontinuance of shift trading, and flexible scheduling practices; increased costs for the hiring of, or elimination of students to work in the public parks each summer; increased costs for the hiring of, or elimination of student interns from the University of Utah; an estimated $500,000 in additional overtime costs and a diminution of some Government services to meet even this conservative estimate; and enormous morale problems.

54. Plaintiff State of California estimates that for the ensuing Fiscal Year 1975-1976, the Act will require an increase in the cost of providing essential State services among the various departments of the State of California, respectively, as follows:

Department of Justice	$459,688
Department of Food and Agriculture	$654,567
Department of Parks and Recreation	$46,000
Department of Consumer Affairs	$56,000
Department of Transportation	$2,000,000
Department of California Highway Patrol	$432,000
Department of Motor Vehicles	$350,000
Department of Corrections	$80,000
Department of Conservation	$4,000,000 – $12,000,000
TOTAL – ALL DEPARTMENTS	$8,168,255 – $16,168,255

The foregoing estimate does *not* include an estimation of the State's administrative expense for meeting the record-keeping requirements of the Act, *nor* does such estimate include approximately 6 million dollars in additional costs to the State by reason of the fiscal inability of city and county fire departments, who are participants in the California mutual aid program, to meet the overtime requirements of the federal Act. Also *not* included in such estimate is tremendous overtime costs (amounting to approximately $750,000 per year) which are required to be paid to California Highway Patrol cadets during their academy training program; the California Highway Patrol has been forced to reduce its training program from 2,080 hours to 960 hours to obviate the application of the federal Act, all to the detriment of the academy training program, a program crucial to the safety and welfare of the People of the State of California.

55. Plaintiff Arizona estimates that for fiscal year 1975-76, the Act will require a $1.5 million increase in the cost of providing State police services, a $200,000 increase in the cost of providing State health services and a $300,000 increase in costs of highway services. This, coupled with additional employee related costs of $300,000, and $250,000 extra needed in highway construction costs, brings the estimated total impact of the Act for one year to over $2.5 million dollars for the State of Arizona alone.

56. Member Cities of Plaintiff National League of Cities, in planning their budgets for upcoming years, have reported to Plaintiff National League of Cities many other illustrations of the irreparable injury they will

suffer as a result of the Act with special damaging impact on such cities who up to now have depended on much volunteer public service. Examples are here set out in paragraphs 57 and 77.

57. Owing to the burdensome requirements of the 1974 Amendments, the City of Los Angeles, California, (pop. 2,816,061) estimates an additional expense for fiscal year 1975-76 in the budget for salaries of fire personnel only, of over $2.5 million, plus an increase in pension costs of between $160,000 and $430,000. This increased cost is the result of time and one-half payment for overtime and hiring of additional uniformed personnel with no increase in service. If in 1978, police workweeks are brought into parity with other employees under the Act, the estimated overtime costs for that department alone would be between $4 and 6 million. These estimates presume the continuance of present salary levels and take into account no future increases in services provided.

58. Owing to the burdensome requirements of the 1974 Amendments, the Sacramento, California, (pop. 254,413) budget for the current fiscal year 1974-75 has already incurred an extra $350,000 cost due merely to non-police and fire services. Also, the City's carefully developed system of compensatory time off, favored by management and employees alike, must now be abolished as illegal under the Amendments. In the area of fire protection services, a new Memorandum of Understanding will be negotiated between fire personnel and the City for fiscal year 1975-76. The uncertainty presented by the diminishing exemption under § 7(k) of the Act renders these negotiations nearly impossible. By

January 1, 1977, in order to merely meet the Act's requirements in fire protection services, the City must either diminish services or hire 16-17 additional fire-fighters at a cost of $310,000 in 1974 firemen wages. If in 1978, the Secretary of Labor study (upon which, under the Act, work weeks will be based) should result in a 52 hour work week, Sacramento's additional cost for present firefighting service would increase $636,000; if a 50 hour week is established, $993,000; if a 48 hour week is established, $1,379,000. Furthermore, conflict between the proposed Regulations for fire and police protection service and the already existing volume of Regulations (29 C.F.R. §§ 500-1899) create uncertainties as to who is and who is not covered under the Act.

59. Owing to the burdensome requirements of the 1974 Amendments, Pasadena, California (pop. 113,327) estimates that in 1978 when the present police and fire personnel exemption could be expected to be in parity with the present requirement for others covered under the Act, the same level of fire protection service at the same wage rate would cost an additional $1.5 million dollars, representing a 50% increase over the current budget for such activities of $3 million.

60. Owing to the burdensome requirements of the 1974 Amendments the City of San Buenaventura, California, (pop. 47,089) estimates its overtime costs for fire personnel to be $72,700 in 1975, $63,200 in 1976, $126,500 in 1977 and $31,600 for each additional hour the work week is decreased by the 1978 survey. These increased costs represent an increase payroll cost by the end of 1977 of 29.1%.

61. Owing to the burdensome requirements of the 1974 Amendments, in Newark, California, (pop. 27,153) an immediate impact of nearly $18,000 will be incurred just to meet the Act's new requirements for overtime for outside training, shift change, manning, call back and staff meetings. The costs of overtime and additional personnel to meet the Act's new hour requirements would range from $24,000 in 1977 to approximately $183,000 in 1978.

62. Owing to the burdensome requirements of the 1974 Amendments, Montebello, California (pop. 42,807) estimates its overall additional overtime costs to be $140,000 per year. In fire suppression service alone it expects a 27.3% increase in overtime costs for 1975 with an estimated combined regular salary and overtime cost increase of $117,922 by the impact date of 1977. Its police department will be affected in that "Reserve" officers who previously worked on a call and emergency basis for a stipend of $25.00 per month, now may not work in excess of 12 and 1/2 hours a month. This program, therefore, has been effectively abolished.

63. Owing to the burdensome requirements of the 1974 Amendments, Menlo Park, California, (pop. 26,734) in order to prevent diminution of services in the areas of crime prevention, traffic enforcement, case investigation and emergency incident response must spend an additional $120,000 annually.

64. Owing to the burdensome requirements of the 1974 Amendments, in Inglewood, California, (pop. 87,985) the police department must curtail its effort to achieve affirmative action goals by providing employment opportunities for men and women interested in a career

in law enforcement. Under the contractual arrangement trainees worked 20 hours per week at $3.57 per hour and books and tuition were provided free for the 20 hours per week of classes. Unable to meet the stricter financial burden placed on this program by the Act the City has been forced to abolish it.

65. Owing to the burdensome requirements of the 1974 Amendments, Clovis, California, (pop. 13,856) must make a decision regarding its internship programs with California State University in Fresno to give students the opportunity to observe and participate, to a limited extent, in daily government operation. Students received as compensation, school credit and a small stipend. The Fair Labor Standards Act will cause the City to eliminate the program or the pay for interns. Some students will have to be excluded from the program either way.

66. Owing to the burdensome requirements of the 1974 Amendments, Coronado, California, (pop. 20,910) estimates additional overtime costs in its fire department alone of over $33,000 for 1975, over $59,000 for 1976 and over $111,000 for 1977.

67. Owing to the burdensome requirements of the 1974 Amendments, Sumter, South Carolina, (pop. 23,895) estimates its overall additional overtime expense and wage increase will amount to $235,000 per year. In addition, the City of Sumter will have to terminate part-time firefighters who also work in other City departments.

68. Owing to the burdensome requirements of the 1974 Amendments in Lodi, California, (pop. 28,691) the necessity that the work period be seven days rather than

the previous practice of one month means extra costs in the computation of payrolls which Lodi must do mechanically, there not being the benefit of a computer available to the City.

69. Owing to the burdensome requirements of the 1974 Amendments, Downey, California, (pop. 88,445) has been forced to abandon an effective proposal for twelve-hour police dispatcher shifts since the scheduling would have resulted in employees working less than 40 hours in some weeks while more than 40 hours in others with overtime costs incurred.

70. Owing to the burdensome requirements of the 1974 Amendments, in Randolph, New Jersey, some full-time employees no longer may serve as staff for volunteer boards or commissions. Since all of these hours must be counted towards "hours worked" under the Act, this practice, helpful to the municipality and commission, must be discontinued and paid staff hired, increasing the cost to the City.

71. Owing to the burdensome requirements of the 1974 Amendments, Phoenix, Arizona, (pop. 581,562) estimates that the elimination of "compensatory time" will result in an additional annual increased expenditure of $100,000.

72. Owing to the burdensome requirements of the 1974 Amendments, Tulsa, Oklahoma, (pop. 331,638) estimates additional costs in its fire department at $126,700 for 1976 and $380,600 additional cost in 1977.

73. Owing to the burdensome requirements of the 1974 Amendments, Sunnyvale, California, (pop. 75,408) estimates that additional costs for its public safety

personnel overtime will be $169,000 for 1975, $186,000 for 1976 and over $204,000 for 1977.

74. Owing to the burdensome requirements of the 1974 Amendments, Corcoran, California, (pop. 5,249) estimates a $49,000 per year increase to all city functions and that it must reduce training time and ambulance services.

75. Owing to the burdensome requirements of the 1974 Amendments, Columbia, South Carolina, (pop. 113,542) estimates that by 1976 its fire protection salary budget will have to be increased by $110,000 in order to merely continue the service presently provided. Furthermore, since under the proposed Regulation (§ 553.6 intended to be affective on January 1, 1975) all job related training is compensable, and since training programs are difficult to arrange during scheduled work hours for these departments, decreased in-service training is a likely result. Such decrease is just as damaging in the long run, and mitigates efficiency of police and fire services just as much, as an outright decrease in service.

76. Owing to the burdensome requirements of the 1974 Amendments, Richmond, Virginia (pop. 249,621) estimates that the hiring of necessary additional firefighters in order to maintain present services and still be in compliance with the Act will cost the City an additional $161,000.

77. Owing to the burdensome requirements of the 1974 Amendments, Reidsville, North Carolina (pop. 13,636) estimates increased police protection costs of $33,567 next year representing an increase of over 10% of the total annual police salary expenditure, and increased fire protection costs of $30,635 next year

representing an increase of over 15% of the total annual fire salary expenditures.

78. In meeting the increase cost of providing the same essential government services currently provided, which increased cost the 1974 Amendments to the Act impose on Plaintiff Metropolitan Government of Nashville and Davidson County, it is limited by Article II, section 9 of the Constitution of Tennessee, which prohibits municipal income, estate and inheritance taxes.

79. In meeting the increased cost of providing the same essential Government services as currently provided, which increased cost the 1974 Amendments to the Act impose on Plaintiff Arizona, Plaintiff Arizona is limited by Article 9, section 5 of the Constitution of Arizona, which limits State debt. Political subdivisions of Plaintiff Arizona are limited by Article 9, section 8 of the Constitution of Arizona to a debt of four per centum of taxable property without a special election and, in any case, ten per centum of taxable property.

80. In meeting the increased cost of providing the same essential Government services, as currently provided, which increased cost the 1974 Amendments to the Act impose on Plaintiff Lompoc, Plaintiff Lompoc is limited by Article XIII, section 40 of the Constitution of California, which prohibits a City or other municipal corporation from incurring debts in excess of revenue for the current year without a special election.

81. In meeting the increased cost of providing the same essential Government services as currently provided, which increased cost the 1974 Amendments to the Act impose on Plaintiff Salt Lake City, Plaintiff Salt Lake City is limited by Article XIV, section 3 of the

Constitution of Utah, which provides that cities and other municipal corporations may not incur debts in excess of taxes for the current year. Article XIV, section 4 of the Constitution of Utah prohibits taxation by cities and other municipal corporations in excess of four per centum of the value of taxable property.

82. In meeting the increased cost of providing the same essential Government services as currently provided, which increased cost the 1974 Amendments to the Act impose on Plaintiff Cape Girardeau, Plaintiff Cape Girardeau is limited by Article 6, section 26 of the Constitution of 1945 of Missouri, which prohibits Cities and political subdivisions of the State from incurring debts in excess of revenues for the current year, without a special election. Article 6, section 26(b) of the Constitution of 1945 of Missouri limits the excess of debt over revenue to five per centum of the value of taxable tangible property, even following such a special election.

83. Plaintiffs State, political subdivisions and Cities are and will be required by the 1974 Amendments to the Act to alter work schedules and other personnel policies of long standing and proven effectiveness, for no reasonable reason related to the effective provision of essential Government services to the people within Plaintiffs' jurisdictions. The only purpose to Plaintiffs for this alteration of schedules and policies is to minimize the overtime wages provided for under the Act as amended, so as to keep within budget law requirements.

84. Plaintiffs are further irreparably and immediately harmed in that § 16 of the Act imposes a $10,000 fine plus up to six months in prison for willful violations. Furthermore, any violation of § 6 or § 7 of the Act

results in a Civil liability of back pay plus an equal amount in liquidated damages. Thus, literally, each hour of the Act's application to Plaintiffs results in the potential of double damages in a suit under the Act.

85. The facts set forth herein demonstrate the irreparable harm imposed upon Plaintiffs for which Plaintiffs have no adequate remedy at law; Plaintiffs are entitled to a Judgment adjudicating their rights and an injunction to prevent Defendant from enforcing this unconstitutional Act against Plaintiffs.

WHEREFORE, Plaintiffs demand judgment against Defendant, declaring the Fair Labor Standards Act as applied to States, Cities and political subdivisions of States to be unconstitutional and for the interlocutory, preliminary and permanent enjoining of Defendant from enforcing or attempting to enforce the Act against Plaintiffs or those situated similarly to Plaintiffs, and for such other and additional relief as the facts alleged herein may warrant.

DATED: December 23, 1974.

Respectfully submitted,
EVELLE J. YOUNGER, Attorney General
of the State of California
WILLARD A. SHANK
Assistant Attorney General
TALMADGE R. JONES
Deputy Attorney General

By/s/ TALMADGE R. JONES
TALMADGE R. JONES
Attorneys for Plaintiffs-Intervenors

STATE OF CALIFORNIA)
:
COUNTY OF SACRAMENTO)

JACK WOODARD, being duly sworn, deposes and says that his business address is the Agriculture and Services Agency of the State of California, 1220 N Street, Sacramento, California 95814; that he is Acting Secretary of the Agriculture and Services Agency of the State of California, plaintiff herein; and that he has read the foregoing Complaint in Intervention, knows the contents thereof with respect to the State of California and its named officers, and that the same are true of his own knowledge.

/s/ JACK WOODARD
JACK WOODARD

Subscribed and sworn to before me
this 24th day of December, 1974.

/s/ Billie R. Huntley
NOTARY PUBLIC

Transcript of Deposition of Allen E. Pritchard, Jr., December 23, 1974

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

NATIONAL LEAGUE OF CITIES, et al.,	)	
Plaintiffs,	)	
	)	Civil Action
vs.	)	No. 74-1812
	)	
HONORABLE PETER J. BRENNAN, Secretary of Labor,	)	
Defendant.	)	

DEPOSITION OF ALLEN PRITCHARD, JR.

Washington, D. C.
Monday, 23 December 1974

Deposition of ALLEN PRITCHARD, JR., called for examination by agreement of counsel, at Room 4121, Labor Department, 14th and Constitution Avenue, N. W., Washington, D. C., at 10 a.m., before Dennis A. Dinkel, a notary public in and for the District of Columbia, when were present on behalf of the respective parties:

CHARLES S. RHYNE, WILLIAM RHYNE, and RICK BACIGALUPO, Esqs.; on behalf of Plaintiffs.

NATHAN DODELL, Esq.; Assistant United States Attorney; on behalf of Defendant.

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2	15
3	28
4	38
5	51
6, 7, 8 and 9	55
10 thru 36	60
37	125
Plaintiff's:	
1	234

[4] Whereupon,

ALLEN PRITCHARD, JR.

was called as a witness and, having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. DODELL:

Q State your name.

A Allen E. Pritchard, Jr.

Q Your address?

A My office address?

Q Yes.

A 1620 I Street Northwest, Washington, D.C.

Q What is your position?

A I am the executive vice president of the National League of Cities.

Q And how long have you held that position?

A Position of executive vice president since July of 1972.

Q And prior to that, what was your position?

A I was deputy executive vice president.

Q When did you assume that responsibility?

A 1970.

Q [5] And prior to that, where were you employed?

A I was director of Congressional relations for the National League of Cities since 1966.

Q And prior to that?

A I was for one year the director of the Joint Center for Community Development of the National League of Cities and the United States Conference of Mayors.

Q That was for one year?

A Yes. I organized that.

Q And prior to that?

A I was administrative assistant to Senator James B. Pearson of Kansas, United States Senator, for three and a half years.

Q So that was from –

A From 19 – about April of 1962, as I recall.

MR. CHARLES RHYNE: If it would help you, I have a biographical sketch. Do you want that?

MR. DODELL: That would be helpful.

Thank you, Mr. Rhyne.

BY MR. DODELL:

Q Mr. Pritchard, in the verified complaint, there are a number of allegations made about the impact of the Fair [6] Labor Standards Amendments of 1974 on various cities. I would like to ask you some questions about those allegations.

I would like to start with the city of Nashville; and it is referred to in the complaint as the metropolitan government of Nashville and Davidson County.

I would like to ask you whether Nashville has come into compliance with the amendments with regard to those provisions that were effective May 1, 1974?

A I am not certain that I can answer that they have come into complete compliance. The information that I have as far as Nashville or any other city is concerned, except for those who have indicated an exception as in the case of Cape Girardeau, the cities, the city officials have done their best to comply with what information they have.

I think one of our great concerns is that the lack of information, the lack of understanding, the inability to interpret Title 29 raises great doubts as to whether many of them have complied or are able to comply at this time.

Q So if I understand what you have said –

A I think there is a difference between intent and [7] my ability to swear that they have in all ways come into compliance.

Q Is it – am I correct, then, in understanding what you have said that as far as you know, with the exception of Cape Girardeau, the cities have tried to comply with the act as they understand it?

A I think – yes, it is a general practice of locally elected officials to comply with the law, even though they don't like it.

Q And do you know how much it has cost Nashville to try to come into compliance with those provisions of the act which became effective May 1, 1974?

A I think those figures are in the complaint. Those were figures that were supplied by the city of Nashville. Without detailed papers in front of me, I couldn't recite the details on 15,000 cities; but the data that we have supplied is data that has been supplied us by those cities in their efforts to comply or – what they anticipate will be required to comply.

Q Well, as I read the complaint with regard to Nashville, the only allegations are with regard to police and fire protection; and I don't see any allegations with [8] regard to the cost of complying with the other provisions of the act that became effective May 1, 1974, other than provisions regarding police and firemen. Can we then assume that you are not making any allegation that Nashville has had any extra expense for those other employees?

A I think that the *Congressional Record* indicated that under the – in discussing this legislation that most of the

cities already met the minimum wage standards in most areas.

In fact, there was an indication that the law would have no impact because of that. Our information indicates that most cities do pay the minimum wage, so that as far as – and that has been the big factor in the application that came into effect May 1. There will be an impact in those areas which, under the May 1 application which many of the cities have not completely sorted out yet; and I assume this is also true in the case of Nashville.

In the case of its application to boards and commissions, for example, we still don't understand how that applies and what impact that is going to have. As far as the day-to-day employees in many jurisdictions, the minimum wage did not have an impact.

Q [9] And putting aside for the moment policemen and firemen, since May 1, Nashville has had to pay overtime to employees who have exceeded 40 hours per week; is that correct?

A That's right; and again in Nashville as in many other jurisdictions, as you note – and we can supply data, provisions were made in those cities already for time and a half under local law.

Q Prior to that time?

A That's right.

Q So that provision did not have an impact on Nashville?

A I am not saying it didn't have impact. I don't think the impact has been fully sorted out at this point.

As I indicated, in some areas there are two kinds of impacts that haven't been sorted out that I can identify quickly.

One is that there's a failure to recognize that local government operates much differently than a private business, and much differently than the federal government. A substantial amount of the activity carried on by local government is carried on by lay people who are only [10] nominally compensated. These people serve on planning commissions, zoning boards, hospital boards, all kinds of boards and commissions, library boards, and are only compensated at nominal rates.

There are many other types of semi-volunteer type activities; and how that – these people in their certifications did not understand and do not now understand how that is going to be interpreted.

We have many, many cities that have police – have police reserves, for example, who don't – still don't understand and will not be able to understand the police and fire regulations, the public safety regulations, what the impact of this is going to be.

It is going to be months and months before those things can be sorted out.

There is an impact there.

The other impact which they have not – cannot sort out at this point, which is very critical, is that once these changes are made, they change the whole structure of local salary – the whole local salary structure, the pay schedules, all the way through the system; and what the ripple effect of this is going to be is something that [11] I am sure in terms of an immediate measure at the point in time in which these statements were made had not had an opportunity to be sorted out.

Q Insofar as Nashville is concerned, I think you have said that since May 1, 1974, there's been no substantial

impact on the ordinary, day-to-day employee because Nashville met the minimum wage?

MR. CHARLES RHYNE: I don't think he said that at all. That's your interpretation of what he said. He said there is a ripple effect and an effect they don't realize because of all these other things. You are asking him very general questions. I don't want him to misinterpret your interpretation of his question.

MR. DODELL: I will ask the question again then.

BY MR. DODELL:

Q Since May 1, 1974, you have said that Nashville has tried to come into compliance with the act as well as it can interpret it with regard to its day-to-day employees.

With regard to its day-to-day employees, has there been a substantial impact on Nashville financially in coming – in trying to come into compliance with the provisions that became effective May 1, 1974?

A [12] As far as I can determine at this point, and as far as they can determine, the application on May 1 did not have a substantial impact; but that's as far as they can determine at this point.

Q Now with regard to the figure of 938,000, that is in paragraph 45 of the complaint – and I would like to read you that paragraph.

MR. CHARLES RHYNE: Do you want him to look at it?

MR. DODELL: Do you have a copy?

THE WITNESS: Yes.

MR. DODELL: Thank you for that suggestion, Mr. Rhyne.

MR. CHARLES RHYNE: Which one?

MR. DODELL: Paragraph 45.

BY MR. DODELL:

Q Could you read to yourself paragraph 45?

A Yes. Yes.

Q Now let me ask you first, when that says $938,000 per year, do you know whether that refers to 1975?

A Yes, that does apply to 1975. The increase would be greater in subsequent years.

Q [13] Now do you know how that figure was computed by the city of Nashville?

A It was computed on the basis of the information that they had available from the advance materials supplied by the Wage and Hour Division.

Q Now do you know how much of that is attributable to the provisions with regard to policemen and how much with regard to the provisions regarding firemen?

A My recollection is, without having their statement in front of me, is that that is entirely attributable to that.

Q Yes, but how much is attributable to police and how much is attributable to firemen?

A I believe that most of it, if not all of it, is attributable to fire at this point.

MR. CHARLES RHYNE: Do you want the piece of paper he's referring to? I don't mean to interfere with your thing, but he obviously is referring to some piece of paper.

If you want that, you can have it.

MR. DODELL: That would be excellent, Mr. Rhyne, if there is such a piece of paper. I would be delighted to [14] see it.

MR. CHARLES RHYNE: Rick, do you have the piece of paper that relates to this?

MR. DODELL: Thank you, Mr. Rhyne.

May we have this?

MR. CHARLES RHYNE: Yes.

MR. DODELL: Could we mark this Defendant's Exhibit No. 1 for identification?

(The document referred to was marked Defendant's Exhibit 1 for identification.)

MR. CHARLES RHYNE: I find there are two pieces of paper.

MR. BACIGALUPO: The next relates to the next paragraph.

MR. CHARLES RHYNE: Well, are they both marked Exhibit A?

MR. WILLIAM RHYNE: The next piece of paper relates to the next paragraph.

MR. CHARLES RHYNE: All right. I am sorry.

MR. DODELL: Could you mark these as plaintiff's exhibits – excuse me, Defendant's Exhibits 1 and 2 for [15] identification?

(The document referred to was marked Defendant's Exhibit 2 for identification.)

BY MR. DODELL:

Q I would like to show you the exhibits marked Defendant's Exhibits No. 1 and 2 for identification.

A I have copies.

Q May I ask, is your knowledge with regard to paragraphs – let me take one at a time.

With regard to paragraph 45, entirely based on Defendant's Exhibit 41 – Nos. 1 and 2 that have been marked for identification?

A That's correct.

Q So for the record then – I think this is implicit in your answer, you don't know how many average hours

per week policemen in Nashville or firemen in Nashville were on duty in 1974?

A No. No, I don't.

Q With regard to paragraph 46 of the complaint it is correct, is it not, that if policemen averaged 44 hours per week for Nashville, and they averaged 16 hours [16] per week for the state government in a police function, then they would not exceed the 60 hour per week figure that is provided for under the amendments and provided that the work period was set up under the act, there would be no additional overtime obligation? Is that correct?

A I don't agree with several parts of your point there. I don't know where you get the 44 hours to begin with; and the 60 hours – to my understanding – does not apply in the situation in which – which is described here. This is joint employment as described in here, which is governed by entirely different sections of the regulations.

Q It is your understanding that if the – if there is a joint employment relationship, and if the policeman works in a police capacity for the state government, and also in a police capacity for the metropolitan government, that the 60-hour provision is not applicable?

A My understanding is that – and you get into very minute details of regulations that have just come out – but my understanding is that the joint employment is covered by another section; and that the – in this case, the 40 hours applies.

Q But –

A [17] 60 hours only applies to firemen, I believe. Not to policemen.

Q This depends in any event upon a reading of the regulations, not on the statute itself?

A No. It applies – the hours set in the statute for firemen and policemen are different.

Q Doesn't the statute provide 60 hours – an aggregate of 240 hours for both policemen and firemen?

A Well, I should check that to verify that. Nevertheless, the joint employment agreement is a different section of the statute.

MR. CHARLES RHYNE: I should add, Mr. Pritchard is not a lawyer, and I think you will understand that he may have difficulty in interpreting the law and the regulations.

THE WITNESS: I should say that the information supplied here is based upon the cities – and as you can see, the city attorney having worked with his city, the director of law, interpretation of the regulations and the law.

BY MR. DODELL:

Q Well, there were no final regulations until [18] last Friday, is that not correct?

A That's right, but in those particular provisions they were not significantly changed, as I understand it.

Q Now do you know whether Nashville has already prepared its budget for the year 1975?

A My understanding is that the city of Nashville is on a July 1 budget year, and is currently in their budget year. The new budget will be under consideration for enactment on July 1.

Q So Nashville is presently under a budget that would encompass the next six months?

A That's right.

Q Do you know whether that budget has been premised on the coming into effect of the amendments

on January 1st or not?

A No, it was not, because the information was not available at that time.

Q Well, the statute was available, was it not, Mr. Pritchard?

A The statute was available, but there was no basis for determining how – for example, the biggest problem in police and fire at this point, particularly on [19] fire where the big cost is, was that there was an assumption based upon the general interpretation of legislative history that sleep and eating time would be exempted.

That makes a very substantial difference in the cost. There was no way for anyone to determine that at that point.

That's true of virtually every city that operates under the July 1 budget year.

Q If I understand you then, Nashville's budget is not geared to the new amendments commencing January 1st?

A Not – there may have been some accommodation, but not entirely.

Q Well, your previous testimony was that the cities tried to comply with the law. What was Nashville's anticipation as to how it would comply with the law starting January 1st, if it didn't construct its budget such that it could –

A I don't know –

Q Excuse me. Could I finish the question?

– such that it could finance compliance?

A I don't pretend to be able to read the minds of the city officials of Nashville. It is my job to rely on [20] their information supplied to me. I represent them in that capacity as I do the other 15,000 cities; and I gather the

information and present it to whoever it is appropriate to present it to, based upon their certification of what their interpretation is, and what their – what the impact is. I am in no position to read the minds of the mayor, the city council. I can only give you the facts as to what they produce.

Q Just so I understand – I am not sure I understood your testimony as to whether or not the budget for the next six months provides for the compliance with the new amendments or not?

A It is my understanding that I said that it did not. No one in – on July, when this act was signed in April – and there were no regulations available at that point, no one was in a position to draw any budgets with full understanding of what the implications would be budgetwise.

I would doubt that there would be 10 percent of the municipalities in the country that have budgets – of those that adopted budgets in July, made any provision for the – I have no factual data to back that up. That [21] would be my experienced judgment that not more than 10 percent of those jurisdictions were able to modify their budgets to accommodate this provision.

They did not know at that point how it would apply. We certainly would not have been able to advise them. I doubt this department would. Even at this point, this department is still advising municipalities that there are interpretations which they are not prepared to provide.

Certainly on July 1, they were not prepared to provide it.

MR. CHARLES RHYNE: You mean July 1, 1974?

THE WITNESS: Yes.

BY MR. DODELL:

Q Do you have any information other than your experienced judgment as to how many cities have drawn up their budgets in order to accommodate the amendments that are effective January 1, 1975?

MR. CHARLES RHYNE: Which budget and when? I think we may have a confused record. Some cities have budgets July 1; some January 1. So –

THE WITNESS: And some October 1; some April 1. [22] They are all in various stages of development.

BY MR. DODELL:

Q Let's take one at a time.

If there are cities – let's take cities that have a budget that began July 1, 1974, and ends on July 1 – or June 30, 1975. I think you said your experienced judgment would be that not more than 10 percent of those cities have drawn up budgets to accommodate the amendments that come into effect on January 1, 1975.

Do you have any facts other than your experienced judgment to back up that estimate?

MR. CHARLES RHYNE: Wait a minute. You have two questions in one. Your first question relates to cities that adopted a budget that went into effect on July 1, 1974.

Your second question, as I understood your question, relates to budgets that go into effect on June 30, 1975?

MR. DODELL: That's not correct, Mr. Rhyne.

Could you read back the question, please?

MR. CHARLES RHYNE: I am sorry.

MR. DODELL: Did you understand the question?

[23] THE WITNESS: I believe what you are trying to get at is what – do I have any data that supports the

statement of approximately 10 percent of the cities who adopted budgets on July 1 for the period July 1, 1974, to July 1, 1975, whether or not those cities have complied – have put into the budgets provisions to comply with the act, and particularly that part going into effect on January 1, 1975?

I would say I do not have specific data on 15,000 cities. That's my experienced judgment of watching and working with cities for 28 years, that on the basis of the amount of information available, when it was available, the lead time it takes to adopt a budget on July 1, because those budgets begin preparation back in April and May, and they go through public hearings, and after they have gone through public hearings, major changes cannot be made, that the lead time was such that it was impossible.

It was not a matter of intent. It was a matter of practical impossibility to anticipate and to include in the July 1 adopted budgets provisions to accommodate this act.

[24] BY MR. DODELL:

Q Then I think you said some cities have budgets that begin October 1, 1974, and end presumably September 30?

A Some in October, some in January.

Q As to the cities that have budgets beginning in October, do you have a percentage estimate as to your experienced judgment as to how many cities incorporated provisions in their budget to accommodate the amendments that would go into effect on January 1?

A I would say from my experience that the vast majority of them on the October budgets – and I would

say the same thing for the January budgets, have not provided for the impact of the January 1 change.

This is because all of the information that they have been supplied by the Department of Labor, by the regional offices, by other interest groups that have been trying to keep them informed, has had to advise them that all information is tentative, and that they ought to be very careful as to how they proceed until the regulations were final; and the regulations were not published in the register until December 20.

So budgets that are adopted even on January 1 – [25] effective January 1 in some jurisdictions had to be finalized in October or November because they had to – for example, in some states, in Ohio, the tax – the budgets that go into effect on January 1 are based upon a tax levy developed on a preliminary estimate that had to be made on October 15; and they cannot then adopt a budget which exceeds their tax levy.

So you are dealing with a practical time schedule which in terms of the pace at which these regulations were developed and made known made it practically impossible for jurisdictions to accommodate.

Now, for those jurisdictions who adopt budgets in April of next year, or July of next year, obviously there is time – advance notice which they could look at compliance.

But anything prior to January 1, I have very serious doubts that even a majority of them have been able to comply.

Q Well, Mr. Pritchard, is it your understanding that the statute that was adopted April 8th required action by the Labor Department before it imposed an obligation

upon states and local governments?

A [26] Obviously the statute is a statute. There is a legal interpretation. I am not going to try to discuss that. I am not a lawyer. I do know that the very – the range of interpretations of the application of that act, particularly in the field in question that applies January 1, was so broad – and it still leaves a lot of questions unanswered – that many jurisdictions did not think they would have to do anything.

Let me give you an example:

85 percent of the cities that employ full-time firemen operate with less than – operate under 60 hours right now; but well over a majority of them would still have a significant financial impact even though the law says you work less than 60 hours.

We have jurisdictions in New Jersey, for example, that are just now discovering that they have been working what they called a 42-hour week; and they have a financial impact, even though the law says 60.

Now – and, you know, I can go into the reasons for that; but the fact is that until these regulations were available and they began to understand the implications of the work cycle and the inability to deduct mealtime [27] and sleep time, they did not even understand that there was a financial impact, because their understanding and their employees' understanding was they were working less hours than the law required.

The fact is that it does have an impact and a substantial one.

Q Mr. Pritchard, is it your testimony that it wasn't until recently that jurisdictions understood that even if their employees averaged less than 60 hours, there still

could be an impact upon them as a result of the amendments?

A I would point out to you that the regulations that the cities are dealing with, there are 18,000 incorporated municipalities in this country. We work with 15,000 of those. We try to provide them with as much information as we can; but we can't provide it until you provide it in the first place.

We do not put out skeptical reports or – we don't put it out until we know it and we know it is right. That takes time to get it from you; it takes time to interpret it.

From the department's own standpoint, if we were [28] not providing even that much, from your standpoint, from the department's standpoint, the regulations by the department – the Wage and Hour Division's own statement in here, were provided to the governors and to 800 other people; and those included members of Congress, librarians, individuals, and other state and local government officials.

Now if only 800 out of 15,000, or 18,000, were provided the regulations, and the rest of the information had to be gathered from the newspaper for what – to what extent that's reported, how in the world can anybody expect within a matter of seven days for anyone to come in compliance?

I mean that's absurd on its face.

MR. DODELL: I would like to have this document marked Defendant's Exhibit No. 3 for identification.

(The document referred to was marked Defendant's Exhibit No. 3 for identification.)

MR. DODELL: For the record, this is a letter from Carol Kochelson – I am sorry, Kocheisen, counsel Office

of Federal Regulations, to William Hoffman, Wage and [29] Hours Division, Department of Labor, June 14, 1974, on a letterhead, National League of Cities, United States Conference of Mayors.

BY MR. DODELL:

Q Have you seen that before?

A Yes.

Q May I have that for a moment?

A Sure.

Q Now, Mr. Pritchard, doesn't this circular in June of 1974 from the National League of Cities – and it is under the heading Management Information Service – inform those who received it that they should be cautious in drawing up their work periods and tours of duty because of the provisions of the Fair Labor Standards Act Amendments of 1974?

A For those who received it, yes. It provides a certain amount of information. I would call your attention to the last paragraph in which it says, "As the Department of Labor regulations pertaining to overtime will not be issued until the summer of 1974, many answers cannot now be provided to questions of city administrators and fire chiefs may have."

[30] That is the kind of qualifications that everybody has to work under in the first place.

In the second place, I don't know what the distribution of this is. This report is only available to – this is not a report of general distribution. This report is available to those who subscribe to it for $100 a year. We don't distribute this. This is distributed by the International City Management Association, and only to those who subscribe to it at $100 a year.

I am sure they don't sell 15,000 subscriptions. It is probably in the neighborhood of 1000.

Q Your office received it, I take it?

A Yes, we received it. As a matter of fact, we helped put it together.

Q Your office was aware, then, that way back in June that scheduling could have an impact?

A Certainly.

Q Excuse me. Let me finish the question.

Scheduling could have an impact on the overtime liability of cities?

A Yes. You were asking me about what impact this – what effect this had on people who had July 1 [31] budgets; and I am saying to you that a report like this, even if there were no qualifications in it, put out in June, which was probably as early as anything could be provided, since the bill was only signed the first week in April, would not have reached people in time to be analyzed and fed into the preparation of the budgets adopted July 1.

Q Mr. Pritchard, I addressed this to your observation that even though 85 percent of the cities have an average work week of less than 60 hours, it was your testimony that they still could have a liability for overtime; and you said this is because the regulations weren't out, the final regulations, until December 20.

What I am pointing out to you – and I think you confirm it from your testimony – that in this circular in June, which was available to you in June, and which you helped to put together, it was understood that scheduling of work periods and tours of duty could have an impact on overtime liability; and that was six months before the

effective date of January 1, 1975. That's correct, is it not?

A I am also –

MR. CHARLES RHYNE: Wait just a moment.

[32]You are leaving out the major part of his testimony, which was you couldn't tell the impact from this release because no one knew.

MR. DODELL: Are you testifying, Mr. Rhyne?

MR. CHARLES RHYNE: No. But I don't want this witness subjected to unfair questions. I think he ought to understand what you are implying because you keep trying to interpret his testimony.

I just don't want any mistake. I want a clear record.

MR. DODELL: All right. Let's take it again, then, Mr. Pritchard.

BY MR. DODELL:

Q Did not this report indicate to your office as well as to those who read it as early as June of 1974 that scheduling of work periods and tours of duty could have an impact on liability under the amendments that would become effective January 1, 1975? And I think that can be answered yes or no, Mr. Pritchard.

A No, it can't be answered yes or no.

The traditional practice in local government has been to consider a number of hours worked in a week, a [33] work week, for firemen.

Now, if you read all of the literature, including the reports on fire administration produced by the International City Management Association, which is a big, thick training book, and all the other literature, and the testimony before state legislatures where legislatures have dealt with firemen's hours, the testimony has always

been in terms of 60 hours a week, 56 hours a week, 64 hours a week, whatever that is.

The traditional thinking in the local government level has been on the number of hours per week. Now this law comes along and establishes a cycle which in spite of the meetings that we have held and communications that have been provided is not understood because all of the accounting systems, the bookkeeping systems, the payroll systems, the hours scheduling systems have been keyed to a week, not to a cycle, as is provided in here.

The result of this is that it is imposing itself on a traditional system which the vast majority of local government officials simply do not understand, and do not comprehend. When they were told that firemen had to work less than 60 hours a week in order to avoid overtime, and [34] they looked at their traditional negotiations with their firefighters' associations, and – or whatever process they go through, and understood, as under state law, for example, in some states where they work a 10-14 schedule, that they were working less than 60 hours a week, their interpretation in their budgeting process is at that point – it was that they were in compliance.

Now I am saying to you that there is a period in the application of anything of this kind which so violates the tradition and the common practice that you have to – you can't assume that simply because the people are told that they are going to have to work less than 60 hours, and they understand they work less than 60 hours, that they are going to go into the kind of detail until they see the final regulations; and even under those circumstances many of those people were so firmly of the opinion,

having read the conference committee report the first time this legislation was passed, and having talked to their members on the Hill as late as March of this last year – of this year, that mealtime and sleep time would be deducted, that they were sure – the ones that did understand it, that the regulations would permit that deduction.

[35] Even those that understood the cycle felt that they would be in compliance.

They had a reason – they had every reason to believe on the basis of conversations they had on the Hill and the history of the legislation, and in spite of the discussions that have gone on since, that meal and sleeping time would be deducted; and given that deduction, and their position on the information, many, many jurisdictions felt they were within compliance. There was no reason for them to plan otherwise.

Q Was it your testimony that in the area of fire fighting the work week was the ordinary basis upon which people were paid?

A That's been the general practice.

Q [36] Well, how does that fit in with work cycles?

A Well, you are getting into a very technical subject which I profess I don't – if I had to describe it the way it is described in some of these publications in working out 2-day cycles to 365-day cycles, I would get lost in the jungle of it. I don't profess to be an expert on it.

All I know is that while there is – the fire chief may understand a cycle, the general practice on the people who make the policies, including members of state legislatures as well as local government officials, is that they work on so many hours a week.

Now if you notice in analyzing this, the changes that now are required can comply with the law and place a man on duty six to seven days running, whereas because of the cycle change. Under the old arrangements that very, very seldom ever happened. People worked a day on, a day off, or a day on, two days off.

Now under the scheduling, people can work as many as seven days in a row – six days in a row. For the average person who serves on a city council, and who sets up these schedules and who adopts the budget, he has understood that that fireman worked 60 hours in a week.

Q [37] Is it your testimony, Mr. Pritchard, that historically fire fighters worked a certain number of hours a week and not –

Excuse me. Can I finish the question, please?

– and that that is the way in which fire fighters' duties were prescribed?

A I am saying that has been the common understanding.

Now I understand the cycle situation, and I know that this ranges anywhere from a 2-day cycle to a 365-day cycle, but I am saying that the common understanding of members of state legislature, of members of city councils, of mayors, the common practice, the way it is approached, is one which is not a technical approach in that sense, and when they understand that their employees are working and their employees are satisfied with a 56-hour or 60-hour week, they do not go into the technicalities of the cycles.

Q Well, are your claims of irreparable injury in the complaint based upon the assumption that fire fighters usually work – their duties usually include being paid for

a certain number of hours per week, and this is the basis upon which fire fighters have been paid in the past?

A I am not sure I understand the question.

Q [38] You make claims in the complaint that the new amendments will have an irreparable injury – will inflict an irreparable injury upon municipalities. I am asking if one of the assumptions you are making in coming to that conclusion is that fire fighters worked generally or traditionally a certain period of hours per week, 56, or 60 hours per week, and this is the way their duties were set up?

A I am just not sure how to answer that question. I am – I don't see quite what you are trying to get at.

Q Let me take a different question, then.

I would like to have – this is a letter from Donald A. Slater, Director, Office of Federal Regulations, to Warren D. Landis, Administrator, Wage and Hour Division, July 5, 1974. It attaches the results of a survey of cities of over 10,000 population relative to tours of duty and fire department work cycles.

MR. DODELL: I would like to have this marked Defendant's Exhibit No. 4.

(The document referred to was marked Defendant's Exhibit No. 4 for identification.)

[39] BY MR. DODELL:

Q I would like to show you this.

A Is that the ICMA Report also?

Q I –

A Volume 6, No. 10?

Q I don't know.

Why don't you look at it.

A I am generally familiar with it. I would have to

make sure it is the same thing.

Q In any event, that report was transmitted from Mr. Slater who worked for your organization to the Department of Labor?

A Right.

Q Does not that indicate that traditionally fire fighters have work tours of duty and work cycles that vary from 2-day, 1-day, or 2 days to 360 days rather than a work week, and that that is the traditional practice of fire fighters?

A I don't deny that. I think I said that.

Q Thank you.

A I think I said that there is a difference between what the technician understands and what – and what the [40] general understanding is of the people who would have been alarmed at the implications of this – of the application of this Act.

MR. CHARLES RHYNE: Could we have a copy of that?

MR. DODELL: That was submitted by Mr. Slater to the Department.

MR. CHARLES RHYNE: I understand that. We don't have it here. I want to be sure we have a complete record.

MR. DODELL: We can copy it afterwards, if that is agreeable to you.

MR. CHARLES RHYNE: All right.

BY MR. DODELL:

Q Is what you are saying, Mr. Pritchard, that city officials were not aware that firemen have tours of duty and work cycles of varying –

A No, I didn't –

Q Excuse me. I wish – I have to hold back rather than

to interrupt your answers which is uncharacteristic of me. I wish you would try to wait until I am finished.

MR. CHARLES RHYNE: Your questions are so long, he never knows when you are going to stop.

MR. DODELL: In fact, the answers are quite long [41] and not always responsive.

MR. CHARLES RHYNE: We can argue that at the proper time. This is not it.

MR. DODELL: Yes.

BY MR. DODELL:

Q Mr. Pritchard, are you saying the city officials and budget makers were not aware that firemen traditionally work work cycles of varying lengths rather than a straight work week of 60 hours or 56 hours as the case may be?

A No, I am not saying that. Let me try to phrase it a different way.

I am saying that in the preparation of budgets we begin talking about this in terms of July 1 and October 1 budgets, because you asked me to what extent had these regulations been accommodated in budgets that are now in effect or would be in effect on January.

I am saying that there are many, many factors that are taken into consideration in preparing a local budget.

Here we have an Act which has been passed, which is very detailed. It is covered with a substantial volume of regulations and many interpretive letters, most of which are not yet available. The general impression that comes to [42] the – the general information that comes to the hands of people who are in that process is that if your employees in a particular category are working over 60 hours a week, this is going to have an impact and you better look at it.

Now the fact of the matter is that most of those people understood on the traditional basis that their employees were working less than 60 hours a week, and, therefore, it would not have any significant impact, if any impact at all.

Now the information is, it is true, sent out from ICMA in this kind of a report, but as I noted, this only goes to those people who pay a hundred dollars a year to subscribe to it. I don't know what the number of that is. I suspect it is less than a fifteenth or a twentieth of the total number of municipal jurisdictions.

Now we have also provided – tried to provide some information, but we do not engage in the business of alarming people, of stirring them up until we know what the facts are, as they applied to this particular situation.

Many of these people were in here last March and met with the members of their congressional delegation. I had breakfast one day with a group of those who met with the council for the Senate committee, and they were informed at [43] that meeting, as well as subsequently on the Hill, that they didn't have to worry, that sleeping and eating time would be deductible.

Now they had even those who at that point technically understood the cycle system had every reason to believe a prudent man under those discussions would have assumed that that would have been the interpretation, and they did not get excited about it because they felt they were probably in compliance. They went ahead and prepared their budgets on that basis.

The new regulations which now have come out do not permit that, and many of them are not going to be in compliance. They have not built that into their budgets.

Q Mr. Pritchard, your office sends out information to its members, I presume?

A Right.

Q Your office knew in June – at least as early as June – that scheduling of work periods and work cycles could have an impact on cities even though they employed firemen less than 60 hours a week; is that correct?

A In some categories, depending upon what happened to the eating and sleeping times.

Q [44] Isn't the answer yes?

A Depending upon what happened to eating and sleeping times. It could have an impact.

Q Did your office notify its members that scheduling of work periods and work cycles could have an impact on their liability for overtime? Even if they employed their firemen less than an average of 60 hours a week?

A I would assume we did.

Q Now I call your attention to Defendant's Exhibit No. 3, which was the ICMA Special Report of June 1974 which Mrs. Kocheisen sent to Mr. Hoffman. I call your attention to the second page.

Do you have a copy of this?

A Yes.

Q Does it not indicate about midway down the first – a little below midway down the first full paragraph, after referring to a Wage and Hour Division ruling – does it not state "Thus for firemen with tours of duty of 24 hours or less, no time may be deducted for meal or sleeping"?

A I am not sure I see exactly where you mean. You mean "This report is written . . ."?

Q It is about three sentences above that.

[45] MR. CHARLES RHYNE: Where do you find that

on that page?

THE WITNESS: I see it. Yes, I have it. Right after the parenthetical statement.

MR. DODELL: Oh, you have a missing page.

THE WITNESS: Here it is.

(Indicating.)

MR. CHARLES RHYNE: Okay. Fine.

BY MR. DODELL:

Q So this report at least alerted whoever read it, and your office, that it might be the case that no time would be deducted for meals and sleeping; is that correct?

A I don't quite interpret it that way, knowing the background of it. I think that the report was prepared with the intention of painting the worst situation. I don't think it anticipated or did not anticipate. It indicated that other rules might be issued.

Now we did not – I don't take responsibility for what this says because it is not our report. I don't think we would have advised our people quite that way.

Q But this report in any event alerted your office, because your office received it, and whoever else received [46] it to the possibility that sleeping or eating time would be counted for purposes of calculating overtime? That is correct, is it not?

A We saw this, yes. If that is what you mean.

Q And in advising people as to possible scheduling of 24-hour shifts or 10-14 shifts, this report told cities' options that would be available to them on the assumption that sleeping or eating time would be included; is that correct?

A For those – yes. I am sure that is right.

I would point out, however, that this is only one of

many reports prepared by different people that apply different interpretations to the same subject.

Q What is the international city's – what is it called, the International City Management Association?

A It is an organization of administrators, city managers and administrators of cities, counties, regional councils, other – it is a professional management group of – primary of city managers, but going beyond city managers.

Q Is it connected with your organization?

A Not directly, no.

Q Indirectly?

A [47] No. We associate with each other; we know each other, but it is an entirely different organization. There is no overlapping control over management at all.

Q And for the record, Mr. Pritchard, I would like to note that at the end of this report it says it was prepared by William F. Danielson, Director of Personnel for the City of Sacramento, California; and it says he has extensive experience in advising local governments and fire duty schedules and staffing and has authored an earlier MIS report on the topic.

A Yes.

Q You stated earlier, Mr. Pritchard, that your office participated in the preparation of this?

What was the extent of that participation?

A We participated in the development of the questionnaire. We did not participate in the writing of the report. This was done on their own from the questionnaire.

Q Just to avoid –

A You have a questionnaire in that form, I believe.

Q Just to avoid confusion, I think, Mr. Pritchard, perhaps you are referring to the – there are two exhibits that have been introduced, 3 and 4.

A [48] I am sorry.

No. I am sorry. We did not participate in this.

(Indicating.)

MR. CHARLES RHYNE: By that you mean Exhibit 3?

THE WITNESS: Yes. We did participate in helping develop the questionnaire for Exhibit 4. We did not participate in writing either report, or in the interpretation of the data.

BY MR. DODELL:

Q Now calling your attention to Exhibit 3, and in particular to what is the last page before the list of area directors, in my copy, the first full paragraph states Wage and Hour Division staff members of the national, area, and regional offices have been very helpful to city officials seeking information and assistance.

Now do you agree with that statement or disagree with it?

A I think that is a gratuitous statement. I think that my observation at meetings I have attended where, for example, at the national meeting of this group in Dallas, in October, representatives of the regional offices of the Wage and Hour Division were present, participated in a [49] session, and had to admit in most of the discussion that could not answer the questions.

I think they were – they tried to be cordial and tried to be helpful, but they didn't have the answers and they couldn't answer most of the questions that were put to them. That has been the report that we have had from

most of our people that they have not been turned away in terms of being willing to meet or communicate, but their answers have not been specific enough to be of much help.

Q And what meeting was that?

A That was the annual meeting of the International City Management Association in Dallas, in October.

Q Were you at that meeting?

A Yes, I was.

Q And what are examples of questions that could not be answered at that time?

A Oh, I don't know that I can recall. I know that the group left – the people left the meeting, the discussion, very frustrated by saying, you know, the general response was "Is this what we are going to have to go through every time we want to change a work schedule or set up a different personnel policy? We are going to have to get this kind of [50] runaround to get the kind of answers we want?"

Q Can you recall any specific questions?

A There were a whole series of questions dealing with – well, I think the record of that meeting was taped, and I think if it is imperative that you have that, I assume it could be provided. I would rather let that record stand for itself. I would be – it was about a 2, 2-1/2 hour session, and the questions ran all the way through it. I don't know if I am in a position to recall all those in detail.

Q In paragraph 47 of the complaint, it states Plaintiff Lompoc, California, will suffer vast, as yet inestimable increased costs if it were to comply with the Act with no increase in salary levels and no increase in services

provided.

Do you have any more specific information about paragraph 47?

A Well, the City of Lompoc has been in correspondence with this Department. It, like many other cities, operates with a compensatory time agreement with its employees. The work of local government is very cyclical. The general practice for many years has been for employees to work [51] substantial number of hours during a brief period of time and then take compensatory time at a time that suits their convenience. The elimination of that compensatory time in many jurisdictions is going to increase costs, is going to create hardships for the employees. This is the case in Lompoc. Lompoc itself has determined that it will not comply with the compensatory time provisions, and so advised the Department of Labor that it expects to continue to pay to handle compensatory time off.

MR. CHARLES RHYNE: We can give you the letter that he is referring to if you would like that.

MR. DODELL: If you have it.

Could I have this marked, please, as Defendant's Exhibit No. 5?

(The document referred to was marked Defendant's Exhibit No. 5 for identification.)

BY MR. DODELL:

Q Mr. Pritchard, is there anything in Defendant's Exhibit No. 5 that gives any indication as to the dollar amount of these costs that are referred to?

A No.

Q [52] And I take it you have no idea of what that dollar amount would be?

A Not without the city providing it to me, I would not.

Q And you have no idea, I take it, whether Lompoc is referring to costs for increased costs for firemen, for policemen, or for other employees, or for more than one of those categories?

A I think that – it is my understanding that this applies to the compensatory time under the provisions that went into effect May 1. I assume they would also carry over, however, to the January 1 regulations.

Q Mr. Pritchard, paragraph 48 of the complaint refers to Cape Girardeau, Missouri.

Now do you know whether the Department of Labor has filed a lawsuit that is referred to elsewhere in the complaint against Cape Girardeau?

A I would have to ask the counsel as to the status of that. My understanding is that something has been filed on that, but I am not sure what the exact status of that is at the moment.

MR. DODELL: Mr. Rhyne?

[53] MR. CHARLES RHYNE: Yes. I have the documentation, including a copy of the complaint. This is all being sent in by the city attorney of Cape Girardeau. I may not be pronouncing it right.

These four pieces of paper – I will give them to you – I would like to have them identified so they won't get lost in the paper work.

MR. DODELL: By the way, Mr. Rhyne, these papers you have been kind enough to give me, can we retain those?

MR. CHARLES RHYNE: Yes, you can.

MR. DODELL: I appreciate your courtesy in providing

me these papers.

MR. CHARLES RHYNE: I think we have copies of all the documentation.

Your question was what now?

MR. DODELL: Could you read back the last question, please?

(The reporter read the question as requested.)

MR. CHARLES RHYNE: Let the record show I furnished to Mr. Dodell the complaint and the correspondence that we have with respect to it that has been served on Cape Girardeau.

[54] MR. DODELL: All right.

Could we have marked for identification as Defendant's Exhibits 6, 7, 8, and 9, a letter from Thomas M. Utterback, City Attorney of Cape Girardeau –

THE WITNESS: That is No. 7?

MR. DODELL: This is Exhibit 6, isn't it?

THE WITNESS: 6 would be right.

MR. DODELL: 5 was the letters from Lompoc?

THE WITNESS: Right.

MR. DODELL: 6 is the letter from Thomas M. Utterback, City Attorney of Cape Girardeau, G-i-r-a-r-d-e-a-u, to Jack R. Younce, Y-o-u-n-c-e, Area Director of the Department of Labor; and the second is a letter from the Regional Solicitor of the Department of Labor to Mr. Utterback.

The first letter was October 15, 1974; the second November 20, 1974.

Next is a newspaper clipping from Cape Girardeau. I don't see the name of the publication. It appears – oh, the *Southeast Miss* – it looks like there is probably something else to the title.

Last is a memorandum from W. G. Lawley, City [55] Manager, to the City Attorney, dated December 11, 1974.

(The documents referred to were marked Defendant's Exhibit Nos. 6, 7, 8, and 9 for identification.)

BY MR. DODELL:

Q Recognizing, Mr. Pritchard, that this may not be within your area of knowledge, let me ask, do you know why Cape Girardeau can't merely defend the action that has been filed against it rather than participating in an action here in Washington?

MR. CHARLES RHYNE: Isn't that a legal matter?

THE WITNESS: If you are asking me the legal question as to why one and not the other or something, I can't answer that. It is a legal point.

BY MR. DODELL:

Q Do you know why Cape Girardeau made that judgment?

A Well, I know that Cape Girardeau, like many other cities, if this suit had not been filed by us in the form in which it has been filed, there would have been a very substantial number of independent suits like the Cape Girardeau suit. When Cape Girardeau found we were – when our board approved – acting in this way to do this on behalf [56] of the cities, a number of cities who had intended proceeding along the lines that Cape Girardeau had, either the same basis of facts or otherwise decided not to go to deal with the case themselves, and joined in with – and are looking toward this particular action to deal with their questions.

From a practical standpoint, I would assume that was a consideration in Cape Girardeau, although if there are

other legal implications, I don't understand those.

Q [57] Mr. Pritchard, I am referring to what has been marked Exhibit Nine. This is the memorandum from Mr. Lawley to the City Attorney, and looking at the attached memorandum, according to this memorandum, Mr. Lawley is writing to Mr. Utterback and stating that the starting salary of five men is less than the starting salary per month computed at $1.80 per hour for a 72-hour week?

This indicates, does it not, that Cape Girardeau is unusual in that you indicated that for most localities or basically, there is no impact as a result of the May 1st provision, this would seem to indicate that as to Cape Girardeau there is an impact as to the May 1st provision?

A Yes, that is right. I indicated that generally there would not be an impact. I would not want to say that in every one of 15,000 cities, there was not an impact in some city in some way. There are exceptions, but as the Congressional record itself indicated, the general situation was that most cities were already in compliance in most cases.

Q So, in that regard, at least –

MR. CHARLES RHYNE: I want to make sure the record [58] is clear you are both talking about the minimum wage?

MR. DODELL: Right. The minimum wage as of May 1st.

BY MR. DODELL:

Q In that regard at least Cape Girardeau is not like the more common or general situation?

A In that specific piece, yes.

Q Now, secondly, this memorandum indicates, does it

not, that the fire department in Cape Girardeau utilizes a 72-hour duty week? This is correct, isn't it?

A Yes.

Q So the impact on Cape Girardeau from the amendments that become effective January 1st results from the fact that unlike 85 percent of the cities, Cape Girardeau chooses to use a 72-hour work week; is that correct?

A That is correct.

MR. CHARLES RHYNE: Could I ask one question about the record? I assume you are getting daily copy here. I want to be sure that I order a copy also.

MR. DODELL: Yes. We ordered daily, but realizing it could go to seven, I specified that the transcript for today could be ready by late tomorrow afternoon, and [59] the transcript for tomorrow could be ready by Thursday afternoon, realizing the holiday is Wednesday.

I hope this satisfied you.

MR. CHARLES RHYNE: I wanted to be sure the reporter understands we want a copy of the transcript, also.

MR. DODELL: Could you make sure Mr. Rhyne gets simultaneous delivery?

THE REPORTER: Yes.

MR. DODELL: Could we go off the record for a moment?

(Discussion off the record.)

MR. CHARLES RHYNE: On the record.

With reference to Mr. Dodell's request for the documentation that we have that relates to the paragraphs of the complaint, we are going to furnish to him with respect to those paragraphs of the complaint

that are factual and where we have documents that back up the facts, the exhibits that we have for those, and we will mark them with respect to each paragraph of the complaint so you can readily relate them up to it.

MR. DODELL: That is fine. Thank you, Mr. Rhyne.

[60] MR. CHARLES RHYNE: As we go off the record, we will give you a complete set of all the documentation. That might be easier.

MR. DODELL: Fine.

MR. CHARLES RHYNE: And we can mark those any way that you want to. You are up to Exhibit 9, so the ones that have not been marked, you can mark them. That is fine.

Off the record.

(Discussion off the record.)

(The reporter marked Defendant's Exhibits Numbers 10 thru 36, inclusive, for identification.)

MR. DODELL: While we were off the record, Plaintiff's counsel provided Defendant's counsel with documents relating to paragraphs four through 72 of the complaint; and they have been marked Defendant's Exhibits for identification, 10 through 36.

And I want to thank Plaintiff's counsel for providing those documents to us.

BY MR. DODELL:

Q [61] Paragraph 49 speaks of the payment of time and a half instead of compensatory time off for the more than 7,000 overtime hours accumulated annually merely to provide necessary snow removal services.

Exhibit 10 indicates they have been given the option to accept compensatory time off on the basis of one and a half hours off for each overtime hour worked or to

receive time and one-half overtime pay.

It goes on to say, "By far the vast majority of the workers have chosen to take compensatory time off during the summer months."

I take it as far as you know the, that Salt Lake City did provide an option to the employees to receive time and one-half overtime pay for the work that they did in overtime?

A Yes, they did. I think you will find that is true in several of these other documents.

Q And is it not correct that – well, I think it says – we just read it, the time and one-half for each overtime hour worked – excuse me, that compensatory time for each over-time hour worked was also on the basis of one and one-half hours off for each overtime hour.

[62] Paragraph 49 also speaks of discontinuance of shift trading. Now, is it your understanding that the new amendments prohibit shift trading?

A My understanding is the new regulations that have come out now does permit a certain amount of shift trading within given periods.

MR. CHARLES RHYNE: It does relate to police and fire, only, right?

THE WITNESS: On the new regulations, yes, that is right. It would not affect these people.

I would point out that our understanding of the situation in Salt Lake City is that because of this – this tends to be true in many other jurisdictions – that because of the concentrated – concentration of requirements for snow removal in very brief periods of time, that the need for manpower is rather substantial. And that the employees in that area, many of them

would not work at all on these jobs if they were not permitted the compensatory time off.

The nature of their interest, the people who do this, is that they want that summertime available, and the pay for time and a half at that time would not be of interest to them.

[63] The mayor who happens also to be the new senator from Utah, has gone into this in great detail with me. He says that he expects a very substantial number of those employees would not continue their employment with the City under the circumstances.

Q Well, do you know of any surveys that have been taken to establish this, or is this just his opinion?

A I think it is just based upon what he would have to do as mayor of the city – to provide for that type of service in another year.

BY MR. DODELL:

Q You are reflecting what the Mayor of Salt Lake City told you?

A That is right.

Q Who is that?

A He is now Senator Garn.

Q You are reflecting Senator Garn's judgment –

A I am reporting his judgment.

Q May I finish the question?

You are reporting Senator Garn's judgment that employees would quit if they had to be paid time and a half for overtime?

A [64] That is right. Not all of them, but a good many of them would.

Q You don't know that he has taken any survey to establish that?

A Well, I assume as any good manager has a pretty good idea of what his employees think, and how they feel and what their reaction would be.

Q What is it –

A It is also dealt with in your other Exhibit 11, I believe.

Q What is the difference, Mr. Pritchard, between receiving compensatory time in the summer at the rate of one and a half hours for each hour overtime worked and receiving one and a half times the pay during the winter months and being laid off in the summer months?

A Well, I suppose if you are looking at exactly the dollars, you are paying the dollars out, but the fact is that you deal with the whole question of morale, of continuity of employment, of retention under pension systems.

Once you are laid off, you lose your hospitalization and health insurance, your contributions to your retirement programs.

[65] You are unemployed as far as your credit is concerned. It is a terrific morale problem for employees under that kind of a situation. As long as they are continued in compensatory time, they are still in the – still an employee of the city.

Q So, if I understand your testimony correctly, there is no net difference in cost – may I finish the question?

A Go ahead.

Q If I understand – if I understand your question – your answer to the question correctly, there is no dollar difference in cost to Salt Lake City between receiving compensatory time in the summer at the rate of one and a half hours for one hour worked and taking one and a

half times the pay in the winter and taking the summer off.

A Well, I suppose that would be true. I don't think that is the extent of the impact, however. I think if you are trying to make the point that because there is not a significant fiscal impact on that particular aspect of it, that there is not justification for being concerned about the impact of the legislation, then I would say that you only understand a fraction of the problem.

Q [66] But the complaint also that Salt Lake City will suffer the following irreparable injury as a result of the 1974 amendments: the payment of time and one-half instead of compensatory time off for the more than 7,000 overtime hours accumulated annually merely to provide necessary snow removal services; and it seems to me your testimony is that in terms of cost to Salt Lake City, the payment of time and a half instead of compensatory time off would result in no additional cost to the City of Salt Lake.

A Well, the damage – it seems to me the key to that phrase is not just dollars.

The irreparable injury goes much beyond just a dollar cost. There is a cost in employee morale, there is a cost in continuity of service, there is a cost in the ability of local officials to maintain an esprit de corps among the employees it maintains.

This is a structure of employment which has best fitted the particular geography and climate and weather conditions and employment interests of the personnel in that area.

And the political leadership has negotiated that [67] with its employees as the thing that works best for the

city and works best for the employees, and works best for the community.

And it creates a serious injury to the ability of the city to run its business the way the community wants it run.

Q Would leave without pay during the summer months cure any of these other problems or all of them?

A I am not sure that that is possible. There is – there would be a legal question there as to what authority the city had to grant leave without pay.

Q Do you know whether there would be a legal problem?

A No, I don't.

Q Do you happen to know what the pay period is in Salt Lake City, a week, a month, or biweekly?

A No, I don't.

Q Would it be true if the pay period is two weeks or a month, that within the pay period there would be some flexibility in terms of what you call compensatory time?

A State that again. I am not sure what you mean.

Q [68] Let me try to state it another way. If a pay period is a month, for example, and an employee worked 50 hours one week, might he work less hours or fewer hours the second, third, and fourth weeks and would it still comply with the – with his total pay – would it still comply with the provisions of the Fair Labor Standards Act Amendments and give the same results as if he were getting compensatory time?

A I am not sure that it would at all. I think it depends upon the type of employee you are dealing with and what he is working with.

This applies – in Salt Lake City, this happens to apply to the situation they cited here, that happens to apply to

those people who engage in snow removal.

Now, who knows when it is going to snow and how long it is going to snow? They may need them every day for a longer period of time.

That is something that we have to be available for.

In other jurisdictions, the problem may not be snow removal; it may be a period of tax collections when offices stay open extra hours. It may be a period for some [69] employees when the city is holding budget hearings, and certain employees work extra hours; and then after that period is up, why compensatory time off is what the employee and the city prefers.

Q In some of those situations as we have indicated earlier, where the person would not be completely laid off in the summertime, if he worked a shorter period of time in the summer, let's say 30 hours, 35 hours, or 25 hours, the net cost to Salt Lake City would be the same?

A Well, I don't know – you are creating a hypothetical situation which I am not sure of. You know, I don't know what time a person would have accumulated and whether it would work out that way.

Q Well, suppose a person is working during the busy season in taxes, tax offices, and he works, let's say, ten hours extra a week.

A Yes.

Q Under Salt Lake City's program, he receives – or under your example, he would receive one and one-half hours compensatory time?

A Right.

Q Under the amendments he would receive one and [70] one-half times the amount of pay?

A Right.

Q But if he received one and one-half times the pay during the busy season, and he worked less during the slack season, in an amount of one and one-half times the amount of time he worked overtime, would not the net cost to Salt Lake City be the same?

A Yes, I think I said dollar-wise it probably would be, but that is not the limit of the impact.

Q On the top of page 22, there is a reference to increased costs for the hiring of or elimination of student interns from the University of Utah.

Now, I haven't had a chance to read fully these two letters that you have provided to us, but is this referring to students who would be employed in regular employee capacities, for the city of Salt Lake City?

A I think the letter on page three, your Exhibit number 11, on page three, first paragraph cites the use of interns.

Q [71] Well, do you know whether the – what the reference to "interns" is, whether this is to a part of the student program where the person must do some internship for the – in terms of complying with his course requirements, or whether it's in terms of having an employee simply work like any other employee for the state or the city?

A I think it's probably both. Most cities – you will find other letters in here, in other exhibits – a similar situation where many cities use interns from universities as part of their ability to earn some income to stay in school to supplement their resources for academic work.

And, in fact, we have many of them come to us who offer to work for nothing, just to get the experience; and they do that with cities. Quite frequently the cities pay

them just a nominal amount to have some money in their pocket. It's not really considered by either the employee or the employer as a job in the sense that other positions are productive employment, although they do productive work.

A number of these exhibits cite the fact that they are terminating those programs.

Q Is the irreparable injury to Salt Lake City then that it believes that it should be free to use students in [72] a different way from that in which private industry could use interns?

A I think the view is that they should be able to work out their arrangements with their interns and give them an opportunity for training. And if the students want to use that, and compensate them in the way that the students and the city agree upon.

Q So that if a student worked for a private industry and wanted to agree with a private industry, you would think he should be under one system of regulations, but if the same student were doing the same kind of function for the same kind of purpose for the city government, he would be under a different system of regulations?

A I think you are dealing with two different animals in this situation. You are dealing with, for the most part, the students who have a commitment and a dedication to a public service, that want to be involved; and in many cases, they are willing to work for nothing, just for the opportunity to be in the business, to participate, and to have the experience.

You are dealing in a public center where there is a degree of public accountability and public responsibility [73] and no profit motive involved. There is no incentive

in that sense to underpay and compete as there is in the private sector, or to exploit.

The use of interns in these cases, in many cases, requires considerable additional investment on the part of the city in terms of supervision; and the cities are willing to do this and the political leadership and administrative leadership is willing to do it, because it's a contribution to the public interest.

I think you are dealing in quite a different business when you are talking about the public and the private sector and the use of interns.

Q Do you have any imformation as to specific functions that are performed by these interns from the University of Utah in Salt Lake City – for the Salt Lake City government?

A No, I don't in this particular case; but I know generally what they do in other cities. I assume the thing is similar.

Q So in the case of Salt Lake City then, you don't know the extent to which these interns may be performing the same functions that people are performing either who are [74] regular employees of the City of Salt Lake, or that may be similar to employees who are working for private business?

You don't have that information?

A I don't have that information.

Q Thank you.

I skipped one clause at the bottom of page 21 and carrying over to the top of page 22, which refers to increased costs for the hiring of or elimination of students to work in the public parks each summer.

Do you know how that relates to the recreational

exemption that is provided under the statute?

A I think there is a paragraph in the letter that also deals with that. On page 2 of Exhibit 11.

Q You referred to that paragraph of the letter?

A Yes. I was referring to the – to the paragraph on page 2 of Exhibit 11.

Q I see. Your answer to that question would be incorporated in that paragraph?

A That's right.

Q Looking at page 2, I see the last paragraph which says, "I mentioned previously our road maintenance and snow removal problems, and the serious impact this will have on [75] Salt Lake City.

"After a careful review of our budget problems and consideration of the impact of the Fair Labor Standards Act, we are cutting back 100 employees by attrition. Beginning October 1, 1974, we will not replace terminating employees unless the new hirees receive special approval by the personnel director, city auditor, and Board of City Commissioners."

Doesn't this conflict with what you previously said in terms of there being no budgetary impact on Salt Lake City if people are laid off or given leave without pay in the summer months, and work overtime in the winter months?

A Well, I suppose when you ask me the question is there no budgetary impact, to say that it comes out exactly even is to – you know, I am not constructing a balance sheet here. I am giving a judgment; and I think that within – when you are talking about 7000 hours or work, and you are talking in terms of a small number of employees, I think that there's apt to be – there's apt to

be some imbalance in the situation.

But I don't think that they are necessarily in conflict. I think – I am giving you a general answer to a question you are asking me now to construct a profit and loss [76] statement or a cost accounting statement. I don't pretend to be able to do that to that degree of accuracy.

Q Why would there be an imbalance?

A Well, I suppose because you are not going to be able to – you are not going to let everybody who accumulates time all go at the same time; some of them you are going to have to keep because you have other work, street maintenance that has to go on during the summer. The summer is when you do your street maintenance work. You remove snow in the winter.

You are going to have some of those people that you are probably going to end up having to pay time and a half and keep them on. And you are maybe going to have some of them that have to work overtime in the summer, too.

Your degrees of flexibility, what you have eliminated are the degrees of flexibility in this so that you can't match up one for one; and you are going to have some extra costs involved.

I think you can sit down and construct that and it would come out to the point where you are not going to come out with 100 percent balance.

Q If everybody got all of the compensatory time to [77] which he was entitled, why would there be an imbalance?

A Well, I don't know that I can construct that exactly. I have to take the city's word for it. This was put together by the city, by the personnel director in

consultation with the city attorney. I assume they know what they are talking about.

I don't know that I can – that I should be – should be expected to be in a position to detail every dollar for 15,000 municipalities. It's our practice over 50 years of activity to report the information the same as anybody else would that is given to us by city officials, and it's not the habit of city officials to provide this kind of information and lie about it.

I assume they know what they are talking about.

Q As a matter of logic, wouldn't you agree that your prior testimony appears to be accurate and that this sentence appears to conflict with it?

A No. I don't think my prior testimony was attempting to – as I say – to construct a balance sheet. I was indicating that you – you asked me at that point if I thought that it – there would be any significant fiscal impact whether it would balance out.

[78] I said I thought it probably would. But that's a general statement. I don't know that it would balance out 100 percent. I think it's quite possible that there would be some variance in there.

What all causes those variances, I am not sure I can explain in terms of this particular letter, but I think if they have identified some areas in which it will not balance out, why, that's what they have indicated.

MR. CHARLES RHYNE: I think in fairness to the witness, your questions were mostly hypothetical rather than facts; and this letter deals with actual facts, Mr. Dodell.

MR. DODELL: Well, this letter has to deal with a hypothetical, too, Mr. Rhyne, because it has to compare

the costs of complying with the Act with the costs of going on the way they have been going on.

Neither of those have occurred yet. They are talking as to the future also.

MR. CHARLES RHYNE: They are talking about having to cut off 100 people, for example. That's a pretty hard fact.

MR. DODELL: I would rather not argue with you, Mr. Rhyne. The fact is before being called – before this sentence was called to Mr. Pritchard's attention, he said – [79] and the record will bear this out – that applying the Act in the way in which I had indicated in my hypothetical, would have no budgetary impact on Salt Lake City, but that there would be other impacts on employee morale, on continuity of employment; and the record will speak for itself.

I don't think this is the forum in which we should debate the point.

MR. CHARLES RHYNE: I would certainly agree. You were arguing with him. I thought I would point out you are dealing with hypothetical facts and this letter deals with actual facts.

MR. DODELL: The record will disclose whether that's a fair reflection of what we were talking about.

BY MR. DODELL:

Q Mr. Pritchard, is one way in which this imbalance could occur if Salt Lake City did not find it possible to give the employees all the compensatory time they had earned because it needed them for road improvement or road maintenance?

A I would assume in that case it would work the other way. The city would end up in effect the winner in that

case in having money left over, wouldn't it?

Q I don't understand your answer.

A [80] Well, if a man is entitled to time and a half off and you don't give it to him, and you work him and pay him at the regular time, you have got the work and you haven't paid him for his time and a half; so the city – that wouldn't end up costing the city money. That would end up with the city coming out ahead, it seems to me.

Q That's my point, Mr. Pritchard.

A I don't think that would justify this particular statement.

Q My point, Mr. Pritchard, is if the city were to come out ahead because in certain circumstances if all the employees couldn't use up their compensatory time, then there would be a budgetary impact on the city as a result of it's not – as a result if it's paying time and a half rather than using compensatory time.

A But what kind of a budgetary impact?

Q Well, we were trying to figure out why your earlier impression was not accurate; and I am offering –

A I am not agreeing it wasn't accurate. I am still saying I don't think there was a conflict between the two.

Q All right.

I think we should move on to another area.

A [81] All right.

Q Now, don't these letters, Mr. Pritchard, indicate that notwithstanding the problems that Salt Lake City has – or at least indicates that it will face as a result of the amendments, it has been trying to bring itself into compliance with the Act? That's correct, is it not?

A That's right. And that's what I indicated in my opening statement, I think; also, at a higher cost, at a

lower level of service, and with less satisfactory arrangements for themselves and their employees.

Q Well, when you set a higher cost, Mr. Pritchard, I think you indicated that as far as you could figure out there would be no budgetary impact; was that not correct?

MR. CHARLES RHYNE: That depends – let's don't get such a confused thing. You were asking him about compensatory time. Don't relate that up to the whole picture, Mr. Dodell.

I don't think that's a fair question. Tell him what you are talking about and then he can answer it correctly.

MR. DODELL: Well, Mr. Rhyne, Mr. Pritchard volunteered an answer that really wasn't responsive or went beyond the question that was asked.

[82] All I asked was that – do these letters reflect what – that Salt Lake City is attempting to bring itself into compliance with the Act; and the answer to that would have been yes, Mr. Pritchard – had he volunteered other observations.

MR. CHARLES RHYNE: No. He –

MR. DODELL: Let me finish. He went on and volunteered other gratuitous observations.

Now in part his observations said there would be increased costs to Salt Lake City as a result of coming into compliance; so I will repeat this question then.

BY MR. DODELL:

Q With regard to the claims that Salt Lake City made as to an increased cost resulting from its people involved in snow removal, do you adhere to your earlier testimony that as far as you can see, this would not have a budgetary impact on Salt Lake City?

A That isn't the question you asked me before.

Q That's the question I'm asking you now, Mr. Pritchard.

A I would say that I can't – from the information I have, there would still be an impact. Now, you are limiting your question – if you are trying to limit your question only [83] to compensatory time off, that's one thing. If you are trying to draw that question into the question of the impact of the Act, then I can't make that transition, because in terms of compensatory time off, I'm saying that generally you would have to assume that if everything worked out evenly, there wouldn't be any cost.

The city attorney or the city auditor in a specific statement is saying apparently it will not work out that way according to their calculations. I don't think those two are inconsistent.

I am also saying there are other costs that are involved; and to say that – for you to try to draw the inference that because the compensatory situation works off in a hypothetical argument to come out even, that there is no budgetary impact in the Act, then I have to deny that because there are other cases cited in here to indicate that there are other implications beyond that.

Q All right.

In terms of compensatory time, your testimony is that generally a city could manage its affairs in such a way that there would be no net cost to the city to comply with the amendments; is that correct?

A [84] In dollars paid out, if it all balanced out, I would assume that would be the case.

Q Now with regard to the impact on morale, Mr. Pritchard, do you know what positions unions have taken with regard to the Fair Labor Standards Amendments of 1974?

A Which unions?

Q Is there a general union position?

A Well, I know what the national unions – I know a lot of the local labor councils have not agreed with the national labor unions. In fact, there were a whole host of local fire fighters' organizations who dramatically opposed their inclusion under the Fair Labor Standards Act.

Q The National Fire Fighters Organization supported the amendments?

A Yes, they did.

Q Did the –

A Many local councils did not.

Q How many?

A I don't know the total.

Q Do you know what position the American Federation of State, County and Municipal Employees took?

MR. CHARLES RHYNE: I don't see what relevance that [85] has. It's not relevant to any issue in this complaint.

MR. DODELL: The issue it's relevant to, Mr. Rhyne, Mr. Pritchard has testified that the amendments will cause enormous morale problems. So one must assume that these national unions are taking positions that are contrary to what would be good for the morale of the employees.

I want to know if that's Mr. Pritchard's testimony.

MR. CHARLES RHYNE: He was relating his to the

Act. You are relating yours to the union. I don't quite understand.

MR. DODELL: Mr. Pritchard's testimony is that the amendments will cause serious morale problems among employees. Now, unions generally purport at least to speak for the rights of their employees; so I take it that if Mr. Pritchard is to be consistent, he would – his testimony would be in this instance, the national unions are speaking contrary to the interests of their employees.

That's what I want to elicit from him. It seems to me to be perfectly relevant to test his testimony that these amendments which purport to benefit employees are causing morale problems among employees.

MR. CHARLES RHYNE: All right.

THE WITNESS: I think I can answer that question [86] in the sense that what I am reporting to you and what you have before you is a statement from the City of Salt Lake City which says that – which describes this. I am reporting to you the statement made to me by the Mayor of Salt Lake in arriving at that judgment.

I am not reporting to you my opinion. The labor unions may be reporting to you their opinion.

I would suggest that if you want a comparable answer, you ask the employees of Salt Lake City, not the national union, because this has been worked out with the local employees in that city, and in that particular city, that's the way those employees prefer to work.

What the national labor union generalizes is not necessarily the view of that local jurisdiction, any more than my generalization would apply. I am not generalizing. I am giving you a specific situation.

BY MR. DODELL:

Q When you say this is the way in which the employees in Salt Lake City prefer to work, you are referring to Senator Garn's opinion as reported to you; is that correct?

A Yes. That's an agreement they have worked out in negotiations. I think that's a fair conclusion.

Q [87] But you are basing your opinion on what Senator Garn told you; is that right?

A Yes. I am reporting a factual statement by a responsible local public official.

Q As Mayor, he represented management in the relationship between management and labor; that's correct, isn't it?

A Yes, that's true.

Q Thank you.

MR. CHARLES RHYNE: He also represents the whole public interest, not just part of it. He represents all the people, including labor, unions, everybody else.

MR. DODELL: Mr. Rhyne, you are not the witness.

MR. CHARLES RHYNE: I know, but I think you are trying to –

MR. DODELL: I think you will have an opportunity in cross, if we don't go until 7:00 o'clock, to elicit what you would like to elicit.

MR. CHARLES RHYNE: All right.

MR. DODELL: Off the record for one moment.

(Discussion off the record.)

[88] BY MR. DODELL:

Q With regard to paragraph 52 of the complaint relating to Los Angeles, Exhibit 52 is all that you relied on in the swearing to the truth of paragraph 52; is that correct?

A Let me read that again. Just a moment. Yes, that's right.

Q Do you know how many hours firemen in Los Angeles averaged in 1974?

A Not offhand; not without looking it up.

Q Well, you certainly – in swearing to paragraph 52, did you have in mind how many hours of overtime – excuse me, how many hours firemen in Los Angeles worked in 1974?

A No, I didn't think that was critical. We – the city advised us, given their knowledge of the situation and the knowledge of the act, what the difference would be; and I think that their calculation of the difference is all I need to know.

I don't know that I should be or would be expected to know the hours worked by firemen in 15,000 jurisdictions and remember them.

Q [89] Is there anything in Exhibit 52 that explains how Los Angeles calculated this increased cost?

A Well, I – it was calculated at the request of the mayor by Battalion Chief Mike Mitchell who spent the better part of two weeks back here at various times working with the department here and meeting with people and appearing before the hearings.

He understands the act, probably along with Bill Danielson, as well as anybody in the country. I would have no reason to doubt but what his calculations were made with a pretty full knowledge of the act.

Q But again, answering the question, you have no idea, do you, how he calculated that amount of money?

A He calculated it, I would assume, on the basis of their current work schedules and work plans and the

knowledge of the act, and how it would impact on the city.

I don't know what you mean there. Do you want a yellow pad with his calculations on it? What are you trying to get at?

Q You have never seen a yellow pad with his calculations?

A No, I don't think that would be expected. The [90] city reports – in fact, the city reports at the request of the mayor. I think those figures are safe to rely on. We do this all the time. In testimony with the Congress, the executive agencies, we have no reason to doubt but what they tell us the truth.

Q Do you know what the firemen's work week is in Los Angeles?

A Not offhand.

Q Well, I have here – and I can't make this an exhibit, although we could copy the particular page, because we borrowed this book – this is a book called *Annual Fire Department Salaries and Working Conditions Surveyed in the United States and Canada, as Reported by Locals January 1974*, compiled by Research Department International Association of Fire Fighters; part one is salaries, part two is working conditions; and it appears to indicate for Los Angeles work week, 56 hours. I will show this to you.

A If I would have had to make a guess, I would have said 56. That doesn't surprise me. Why is that relevant? What do you want me to do with that? It obviously deals with a cycle.

[91] You notice that goes back and says the same thing I have been saying. They are reporting a 56-hour

week. Do they discuss the cycles? That's the way everybody has reported for years. They just reported a 56-hour week. They don't say two-day cycles, or 365-day cycles. That goes back to the point I made earlier, why it is so hard to get cities to figure out what is happening to them. Even the Fire Fighters' union reports it that way.

Q Mr. Pritchard, I would ask you to limit yourself to responding to the questions because – in developing facts, we proceed on a question-and-answer basis rather than just what spontaneously may occur to you. I would appreciate it if you would limit yourself to responding to the questions.

MR. CHARLES RHYNE: I think he has up to now. You have asked him very general questions, Mr. Dodell.

MR. DODELL: Could you read back the last question, please, if there was one?

(Whereupon, the Reporter read from the record, as requested.)

MR. DODELL: There was no question pending, Mr. Rhyne.

[92] May I finish, Mr. Rhyne? Excuse me.

THE WITNESS: You asked me a question.

MR. DODELL: There was no question pending. I think Mr. Pritchard volunteered his statement without a question pending.

MR. CHARLES RHYNE: Are you through?

MR. DODELL: No, I am not through.

MR. CHARLES RHYNE: Go ahead and finish.

MR. DODELL: I think Mr. Pritchard volunteered his statement without a question pending. I think my remarks were quite on point that I have been rather patient, but Mr. Pritchard has been volunteering a lot of

information.

I hope his questions would be more directly responsive to the questions.

I would also like to offer that with respect to your comment, Mr. Rhyne, that the questions are not – are general, I think the record will show that every time I have asked a specific question, Mr. Pritchard has said – well, not every time, but many times when I asked specific questions, Mr. Pritchard said, "I don't know the answer. This is just what the city has reported to me." I think [93] that's significant. I think the Court will draw its own conclusion from that fact.

Now I am through, Mr. Rhyne.

MR. CHARLES RHYNE: I think all of your comments are totally uncalled for. I have let you ask very general questions, most of which have no relevance to anything. You have reached out here and gotten a report that you don't even show to us, and you have asked questions about the firemen and their hours and his comment related entirely to firemen and hours.

So it was in response to your question. You are making as many statements as you are asking questions. It creates a very confusing record because you go from the general to the specific, and then sometimes you don't relate your specifics up to anything.

So we have got a – really a very fuzzy record here because of the way that you are asking your questions and what you are including in them.

MR. DODELL: Are you through?

MR. CHARLES RHYNE: I am through.

BY MR. DODELL:

Q Mr. Pritchard –

[94] MR. DODELL: By the way, Mr. Rhyne, you said I haven't shown you this. Let me show it to you. Take your time and look at it. I am showing you the document that I previously referred to.

MR. CHARLES RHYNE: The page you have given us relates to Los Angeles County, not Los Angeles City.

MR. DODELL: That may be correct.

MR. CHARLES RHYNE: I am looking at pages 131 and 132.

MR. DODELL: Then it is my error, if that is so.

MR. CHARLES RHYNE: The prior pages don't have Los Angeles City at all. I just have to give it back to you, because page 131 and 132 only refer to Los Angeles County, and have nothing to do with the city.

MR. DODELL: You are correct, Mr. Rhyne, that the reference here is to Los Angeles County.

Let me ask –

BY MR. DODELL:

Q Do you know what relationship there is between Los Angeles County and Los Angeles City?

A No, I don't follow the county situation.

Q But you do not know the work week in Los Angeles [95] City? I think you have answered that.

A Not specifically, no.

Q Do you know it generally?

A I would assume, because of the general situation on the West Coast, that it is probably 56 hours; but I wouldn't want to swear to that without checking it out.

Q And if Firemen all worked a 56-hour work week in Los Angeles City, then the – and if the work period and work cycle were adjusted to comply with the act's provisions, then there would be no impact by the

amendments; is that correct?

A If the adjustment is made is what creates the fiscal impact. That was the point I made earlier. That's why I made the point earlier that many cities who looked at a report like this and said okay, we are in compliance because we are working less than 60 hours, this doesn't affect us; and they didn't adjust their budgets because they didn't think it applied.

Now they get in and start looking at the work cycles, they find they do have an impact. The one document that you submitted – I think that fact is pointed out, back here in Exhibit 3, I believe it is.

[96] There's a – either three or four, there is a reference to the fact that – on page 3, it says, "Any fire duty cycle less than seven days or more than 28 days in length will cost the city unnecessary overtime. For example, some cities presently have a fire duty cycle three days in length. This cycle calls for 24 hours duty, on duty, and 48 hours off duty. Even though this cycle is equivalent to an average of 56 hours per week, a city that maintains this particular cycle beginning January 1 may be liable to pay unnecessary overtime."

So in order to bring that in adjustment, and to avoid the overtime, they still end up with a cost because they have to put on more people in order to comply.

Q But, Mr. Pritchard –

A That's what produces the cost in here.

Q Mr. Pritchard, since June, your office has had information – I think we went over this earlier – which would have permitted any city that had a 56-hour work week to come into compliance with the act; is that not true?

A No. Because the regulations were not issued until last week. The law doesn't apply until January.

Q But, Mr. Pritchard, I would ask you to examine [97] Exhibit 3 and does not Exhibit 3 tell cities a way in which they can come into compliance with the act if they have a 56-hour work cycle, assuming the most expansive view of the regulations; and that – let me complete the question. May I complete the question?

A Yes.

Q And does not this bulletin indicate that it was, even under the most extreme view of the regulations, it was possible way back in June for a city to arrange a 56-hour work period so that it would have no liability under the amendments? Is that not true?

MR. CHARLES RHYNE: Just a minute. Just a minute.

There are about six questions in one, all based on a lot of assumptions based on regulations that hadn't even been put out in tentative form in June; and it is impossible for this witness to give a meaningful answer based on all of the assumptions that you have given him.

There were no regulations in June when this came out, not even proposed regulations. No one could even speculate as to what they might be with any degree of accuracy. So to try to get him to speculate and give answers is really requiring an answer that's so much in the [98] speculative as to be worthless and the kind of thing we are going through.

MR. DODELL: Are you directing the witness not to answer, Mr. Rhyne?

MR. CHARLES RHYNE: I am not going to do that.

MR. DODELL: Can you answer, Mr. Pritchard?

THE WITNESS: I have a hard time answering because,

as counsel said, there are about five questions posed in there with a lot of conditions.

I think in the earlier part of the questioning I indicated that some cities had this report based upon their subscription to it; and so to that extent they had some notice. There were a number of "ifs" that were still involved, including eating and sleeping time which affected their budgetary planning. That was one – so, yes, some had notice; but to prepare a budget and to budget on the basis of this would have been difficult.

I think the second part of it is that the question we are dealing with is how did Los Angeles calculate these figures; and these are calculated without regard to whether the money is in the budget and when they had notice for it really doesn't make that much difference.

[99] The question is whether they have it in the budget or not in the budget, whether it will cost them that much money.

BY MR. DODELL:

Q Mr. Pritchard, does not this state, on page 2 – by this, I am referring to Defendant's Exhibit 3, "For cities that use a 24-hour fire duty period, a 10-14 fire duty period, or a 9-15 fire duty period, there are only two possible fire duty schedules between 7 and 28 days that are equivalent to an average of exactly 60 hours per week"? And does this not then give the examples of those schedules.

A Yes.

Q So doesn't this lay out pretty plainly to the cities how they could comply with the act and not pay overtime, and still have a 60-hour schedule?

A I would assume there are more options if you work

50 – if you did on a 56. If you have been on something other than this schedule.

Q There were more options?

A I suppose.

Q Thank you.

[100] So if one had a liability – if a city had a liability and used the 56-hour work week, the liability would result from its not choosing any of the options that were available to it?

A The question I – the question I understand we are dealing with is how did Los Angeles calculate these numbers? Are we back to where we were? Are we going to reargue this again? I thought we were trying to answer the question how did Los Angeles. That's what you were trying to get at.

Q Mr. Pritchard –

A I don't know where you are.

Q I think you should just try to answer the question that is asked. If counsel has an objection –

MR. CHARLES RHYNE: Well –

MR. DODELL: May I finish?

MR. CHARLES RHYNE: No. I want to point out your question is unanswerable because they are so confusing.

MR. DODELL: I think you should extend me the courtesy of letting me finish.

MR. CHARLES RHYNE: I have been very courteous to you. Maybe too long.

[101] MR. DODELL: You can make your own judgment in that regard, Mr. Rhyne. I think you should wait until I finish, and I will wait until you finish. I have been waiting until the witness finishes, although I thought his answers went beyond the questions. I have

been very patient.

MR. CHARLES RHYNE: I disagree with that, but go ahead.

MR. DODELL: You are entitled to your disagreement.

The last question that I asked is: If a city with a 56-hour work week would risk liability as a result of the Fair Labor Standards Amendments, would this result from its not taking one of the options that is – has been available to it?

MR. CHARLES RHYNE: That's a legal question. How can you expect this witness to answer that? You are asking him about liability.

MR. DODELL: Well, Mr. Rhyne, there is a pending question. Your objection is noted; either direct the witness not to answer or permit him to answer.

MR. CHARLES RHYNE: I am not going to direct him [102] not to answer. I will let him do the best he can. I think it is difficult for a non-lawyer to answer a legal question. You asked about liability.

MR. DODELL: Mr. Rhyne, as you know, objections of that nature aren't waived, it seemed to me, by not being made. I think the flow will – if you are not going to direct him not to answer –

MR. CHARLES RHYNE: I am not going to direct him not to answer. You want the question reread?

THE WITNESS: Yes.

(Whereupon, the Reporter read the question, as requested.)

THE WITNESS: The question doesn't make sense to me the way it is stated.

MR. CHARLES RHYNE: Okay. That's it.

BY MR. DODELL:

Q It's been your testimony, has it not, Mr. Pritchard, that under the 1974 amendments, a city with a 56-hour work week could be liable for time and a half overtime for fire fighters, is that correct?

A It could be.

Q It could be.

[103] Now you have also indicated that a city – in response to questions, that a city with a 56-hour work week had more options available to it than a city with a 60-hour work week; is that correct?

A I said I would assume. I am not technically competent to go through all those different calculations; but it would just seem logical to me that it would.

Q Now what I am asking you is if a city with a 56-hour work week becomes liable for overtime payments under the '74 amendments for fire fighters, would that result from its not taking an option that is available to it?

A Well, I suppose it could be. If it had notice.

MR. CHARLES RHYNE: I think we ought to recess for lunch pretty soon.

MR. DODELL: I am hungry. We can recess now.

MR. CHARLES RHYNE: How about recessing until 25 to 2:00?

MR. DODELL: Would 2:00 be better?

MR. CHARLES RHYNE: Fine.

(Whereupon, at 12:35 p.m., the deposition was recessed, to reconvene at 2:00 p.m., this same day.)

[104] AFTERNOON SESSION

(1:50 p.m.)

Whereupon,

ALLEN PRITCHARD, JR.

resumed the stand as a witness and, having been previously duly sworn, was examined and testified further as follows:

EXAMINATION (Continued)

BY MR. DODELL:

Q Now in paragraph 53, this is a reference to Sacramento, California. The first question I have is that there's a reference there to the budget for the current fiscal year, 1974-75, as having already incurred an extra $350,000 cost due to mainly non-police and fire services.

Do you know whether that refers to a budgeted item or an actually spent item?

A Will you identify where you are?

Q I am sorry. Paragraph 53 of the complaint.

A I see. All Right.

Well, this is explained in Exhibit 14 in a communication from Mr. William Danielson, the director of personnel on page 2. The complaint cites the data.

Q [105] And at page 2 also it says, "This has" – "the sudden cutoff of the compensatory time usage for employees other than police officers and fire fighters is estimated to have resulted in additional costs in the current 1974-75 budget approximating at least $350,000."

Do you know whether this is actual cost or budgeted costs?

A Well, since the year isn't up, they obviously couldn't have incurred all of it. It is obviously what they estimate will be spent during this budget year. They are only part way through the budget year. It couldn't have been actual.

Q And again –

A It would be projected.

Q Here the references are to the sudden cutoff of compensatory time usage. Would the same observation that you made with regard to Salt Lake City be applicable here insofar as you are saying that a matter of logic at least other things – let me start again.

As a matter of logic, at least, it would seem that compensatory time could result in the same cost to the city as payment of additional overtime if the figures [106] balanced?

A Let me reacquaint myself with his facts here.

Well, theoretically I think the statement I made before is probably adequate in general theory. Obviously I know of no one in the country that knows more about the application of this legislation than Bill Danielson does. He wrote that report earlier; and – that you cited, Exhibit 4.

Based upon that knowledge, he has concluded that for the city there is an additional cost. Exactly where that comes from, I don't know that I can explain; but this, I think, supports the statement I made earlier that they aren't going to balance out exactly. It is good theory, but it just doesn't work out that way all the time.

Q But you don't know why it doesn't work out?

A No, I don't.

Q Do you know what the total payroll is of the Sacramento – city of Sacramento? I don't know whether it is in here or not. I simply have not had a chance to read this entire document.

A No, I don't. Not without doing a little research on it.

Q [107] Now –

A Obviously I just can't carry al. those numbers around in my head for that many cities.

Q Now with regard to Sacramento, there is a reference to the cost – in paragraph 53, there is a reference to the cost for the year beginning January 1, 1977. At least that's what it appears to say. By January 1, 1977, in order to meet the act's requirements on fire protection services, the city must diminish services or hire 16 to 17 additional fire fighters at a cost of $310,000 in 1974 firemen wages.

Do you know whether – let me start again. Does that imply that in 1975 there will be no additional costs for fire fighters in Sacramento?

A One thing about Bill Danielson is that he knows so much detail it takes a little while to get through it.

MR. CHARLES RHYNE: Look on page 4. I think if you look on page 4 in the second paragraph where he says, "Looking ahead to January 1, 1975 . . . "

I think you will see what he's asking about.

THE WITNESS: That deals with an administrative problem.

[108] MR CHARLES RHYNE: Oh, I see.

THE WITNESS: The 310,000 is . . .

I would assume that from the way he states this that there is a '75 cost, but he has not cited the exact amount.

BY MR. DODELL:

Q Well, given the – I am sorry. I didn't mean to interrupt your answer.

A It doesn't appear to be as significant to him as does the later cost, because he indicates here that their duty hours at present are 58, six gross and 56 net; and on a net schedule of hours of 54 hours a week.

See, that's for '77, isn't it?

Where did I – I am sorry. I am reading the wrong paragraph here.

Yes. Agreed to pay overtime over 54 hours. That's on page 3.

MR. CHARLES RHYNE: I am sorry. I guess I misled you then.

THE WITNESS: I can't give you a specific cost for '75.

[109] BY MR. DODELL:

Q Thank you.

A I am not going to guess at it.

Q Now in the case of paragraph 54, the only information with regard to Pasadena that's been alleged deals with 1978; that is correct, is it not?

A That's correct.

In fact, they indicate that there would be no increase in cost for '75.

Q And in the case of San Buenaventura, there the only reference is to overtime costs for fire personnel; that's correct, is it not?

A That's all they have referred to.

Q And there the average work week is indicated in Exhibit 16 as in paragraph 4, an average of 62.3 hours.

A Based on a seven-day work period. I don't know what that translates to in the cycle business, but apparently they calculated that because they show the '75 cost and the statistical compilation below at $72,700.

Q But it is correct, is it not, that the statute does permit a seven-hour work period – seven-day work period?

A That's right.

Q [110] Period?

A Cycle.

Q Period is what is referred to. 7-K refers to a work period?

A Right.

Q So here we are talking about an impact on San Buenaventura in 1975 that would result from the fact that San Buenaventura exceeds by 2.3 the 60-hour figure which I think your own – your survey and the complaint indicates is compiled with by 95 percent of the cities; that's correct, is it not?

A That's right.

There is one thing that is not clear in the calculations that show up in some of these tables. That is whether these hours include, again, eating and sleeping time or mealtime deductions or whether they don't. You cited that report this morning; and we did not have the chance to check that before, you know, accepting those numbers as valid.

I would like to know whether those – those 56 hours, for example, that were cited, and whether – and again whether this 62 hours is inclusive or exclusive of [111] that.

Q You don't know whether it is or is not?

A On that table, I am not at all sure.

Q Actually the table – the figure we referred to in the table was Los Angeles County, Mr. Rhyne corrected me.

A Yes. I am just pointing that out in throwing these hours around that we ought – that the impact has to be considered in terms of whether those are in or out.

Q Do you know in the case of San Buenaventura whether the 62.3 includes or does not include sleeping or eating time?

A Generally the hours calculated exclude sleeping and eating time. That's generally the way it is stated.

Q Well –

A It is the net.

Q All right.

When you – I assume that the National League of Cities or its counsel obtained this information from the cites that supplied it; is that correct?

A Yes. If they don't state it, if they don't state it, the normal assumption would be that it excluded [112] eating and sleeping time.

Q How would –

A That's normally –

Q How would you demonstrate that's the normal assumption?

A Well, it's just normally the way it is done.

Q Normally –

A Because – that's been the general practice. In calculating firemen's hours.

Q I thought you said you didn't have a great familiarity with the way firemen's hours were calculated earlier?

A I didn't say that. I said I didn't want to try to get into going through all those Xs and Os on schedules. I think that gets into a lot of mathematical stuff that I am not ready to get into here. I think the general practice is – the general practice is to calculate hours on net hours.

Q So it is your testimony then that this 62.3 hour figure is a net figure that excludes sleeping and eating?

A Yes. I think if you look at Danielson's figures, [113] I think maybe his – no, I guess his didn't. There was another communication that cited that more

specifically, as I recall; but if the eating and sleeping time is included as it is under the regulations now, the cost here would have to be assumed to be higher; but how much higher, I don't know.

Q All right.

A I would say this, as a result, is a low figure, not a high figure.

Q You don't know that of your own knowledge. That's an assumption you are making; is that correct?

A That's an assumption based upon general practice.

Q And you know the general practice to be the case?

A That's right.

Q Do you know if there was testimony at the hearings with regard to what assumption is made – do you know whether at the hearings any assumption was made with regard to the sleeping and eating time, and whether it is included or not?

A No, I didn't attend all the hearings. I wouldn't want to vouch for that.

Q [114] So according to your assumption, then, your assumption would be that San Buenaventura firemen are on duty a substantially longer time than 62.3 on the average?

A Well, it depends on what the definition of "on duty" is. I am saying that the definition as normally used did not include eating and sleeping time for this kind of calculation. Under the new regulations, you would be right.

Q You can't point to any place in writing where it is indicated that that assumption is made by the people –

A No.

Q Let me finish.

– either by the people responding or in terms of your inquiry to which they were responding?

A No.

Q Was there a letter that asked these cities for information?

A Not that asked for it in that way, that we – the request – the only indication was that any cities that had any examples of how they were going to comply or what the impact was going to be, they were asked to supply that; and these were supplied based upon their own [115] interpretations of the impact of the act, not according to any specific form.

Q Was this request for information by way of a circular or by phone calls?

A We didn't – some of it was direct by phone calls; some by communication; some by personal conversations.

Q There was no general letter sent your membership?

A No. Not to go through this with everybody. It – we didn't feel because of the nature of this case that it was necessary to compile a record on every municipality. Our view was the Constitution was violated if there was any impact, whether it was a dollar or $500 million.

MR. DODELL: Mr. Rhyne, if you would indulge me, I wonder if you would be kind enough to inquire of Mr. McHolme was that his assumption was 6200 was included or excluded?

MR. CHARLES RHYNE: Let me say to you everything that is in here, we sent to the city attorney and told him to check the accuracy. We didn't ask about anything like that. So there is no city here that hasn't been, [116] in effect, double-checked as to the accuracy

of what has been said here in writing and by their city attorney. We didn't ask that question.

Of course, I should also – you can take this off the record or on the record – we didn't use all of the cities that replied. We just used examples. We would give you a stack that would be rather enormous.

THE WITNESS: It would be longer than 68 pages.

MR. DODELL: Responding to that, we can only deal with what is before us.

MR. CHARLES RHYNE: I understand that. I want you to understand we selected some of them and not all of them.

MR. DODELL: I appreciate your mentioning that.

As I say, we can only deal with what is before us.

I do appreciate your undertaking to find out what assumption was made in that regard.

MR. CHARLES RHYNE: We will. We will find out with respect to Buenaventura. That's the one you are asking about?

MR. DODELL: That's the one I asked about.

MR. CHARLES RHYNE: I don't want to call them all.

[117] MR. DODELL: I think it would be a big burden to call them all between now and next Monday, which is the date of the hearing.

BY MR. DODELL:

Q In paragraph 56, Exhibit 17 was provided with regard to paragraph 56; and I note that according to the city manager of the city of Newark, California, at page 3, it is indicated that for regular personnel in the fire department, during the years 1975 and '76, the current manning level in schedule of the fire department personnel is adequate to meet the mandated hours.

That is correct, is it not?

A Yes, that's what he states in here on page 3.

Q I recognize that he deals with other impacts, but in terms of regular personnel of the fire department –

A Right

Q – he indicates there is no problem in '75 and '76?

A Right.

MR. CHARLES RHYNE: But I read Fair Labor Standards Act of 1974 would have an increased financial impact of $76,632.30 on the police department.

THE WITNESS: You are asking about the fire, [118] were you not?

MR. DODELL: Yes. I asked about the fire.

MR. CHARLES RHYNE: Excuse me.

MR. DODELL: I said regular personnel of the fire department. I said I recognized there were other indications in here.

MR. CHARLES RHYNE: Okay.

[119] BY MR. DODELL:

Q Again, though Mr. Rhyne, since you did bring that up, again here at page two, there is a reference to elimination of compensatory time, which accounts for a part of that amount, and I realize that is a $3,000 figure, but that again is something that we have dealt with before in regard to Salt Lake City and San Francisco, where we talked about the impact on the budget of the using – paying overtime instead of compensatory time.

I simply say that in regard to your observation.

Now – Mr. Pritchard, according to the figures here on page two with regard to reserves, and with regard to voluntary hours, it is true, is it not, that under the Fair Labor Standards Act, whether a person is a volunteer or

an employee is a question of fact to be determined in each case, and that volunteers are not required to be paid – genuine volunteers are not required to be paid in accordance with the Act; whereas if the employment relationship is determined to exist, then they are so required, is that right?

A My understanding is that there is a nominal compensation figure below which it is assumed that it is – [120] there is no compensation. That figure is pegged at $2.50 for a given period. In the case of – I believe that is only in the case of police and fire, or only volunteer fire department personnel.

I think this situation on volunteers is far from clear at this point, and what we have been told up to this point is that – and the only thing we can advise the city is that these are going to have to be dealt with one a one-to-one basis and the decision will be made by someone in the wage and hour division and not by local officials.

So, there is no way to know in advance.

Q And is it your understanding, Mr. Pritchard, that with regard to the Fair Labor Standards Act in general, every issue is determined in advance or ascertained in advance and that there are no issues that may require –

A Well –

Q Excuse me, may I finish?

– that there are no issues that require interpretation and ultimately may have to be resolved by the courts?

My understanding is that there are so many issues unresolved and unclear that the cities in trying to [121] comply with this are going to be in a mass of confusion for the next year, year and a half, and they are going to be subjected to – and abused by all kinds of legal attacks

and charges to pay penalties out of public funds, and personally without any intent to violate the law, but simply because it is impossible to interpret the regulations as they apply to local governments.

85 percent of that does not apply to local government officials, but they have to read every bit of it to know whether or not it applies.

(Indicating.)

MR. CHARLES RHYNE: By that, what do you mean?

THE WITNESS: Title 29, parts 500 to 1899. I would like to challenge anybody to go out and hand this to a city council or mayor of a city of 500 or a couple of thousand and tell them to sit down and read that thing when he works one evening a week or one evening every other week as a councilman, and sit down and digest that and tell what he has to do with his personnel to bring them in compliance with the law and avoid being subjected to severe penalties under the Act.

[122] BY MR. DODELL:

Q Mr. Pritchard, is it your opinion that a statute has to be clear in every application in advance of interpretation, in advance of court decision?

A I think that is a legal interpretation that I am not going to try to interpret. I have a personal opinion, but I don't think that is a legal opinion.

Q You volunteered some other comments. Are you unwilling to answer that question?

A I can interpret the practical problem of a city administration having to read through that and cipher out what does not apply and what does apply, and when we have been told by the wage and hour division that probably 85 percent of it does not apply, and when we

have asked questions about the fuzzy parts, every part – every question that has been raised we have been told that it will have to be interpreted on a case-by-case basis.

Now, where does that leave a – where does that leave local government officials in trying to determine where they stand under the Act? I am saying that the regulations are so voluminous, they have been imposed in such a short period of time, with so little opportunity to [123] understand – there is no publication of this kind for state and local government as it applies to state and local government officials.

The wage and hour division told us when we talked to them about this back in May, they said we don't have any problem. Everything in Title 29 is all there has to be, and you will be covered by it, and that will meet your needs.

There is no publication put out that can be handed to them and say this is what applies to local governments. They have got to go through that and cipher it out and try to figure out what applies. What is fuzzy they have to try to get specific rules on.

I am saying for the next year and a half to two years, there is going to be a mass of confusion which is going to completely disrupt 200 years of stylized operations, which has been a tradition at the local government level.

Q Mr. Pritchard, the prior amendments of the Act in 1966 brought under the Act – if my recollection serves me, three and a half billion – no, that can't be.

Well, let me put it this way: in 1966, there were amendments to the act that brought under the Act employees of hospitals that were run by states and local [124] governments, and employees of schools that were run by state and local governments.

Did those people manage to comply with the Act?

A I wasn't involved in the discussion at that time. And I don't know that I can cite the exact history, I do know that the number of units that were involved were very nominal, because most of the hospitals, only about 20 percent of the hospitals in this country are public hospitals, and most of those are operated while they are called municipal or public, are operated by special districts and not by municipal organization, and they are very specialized types of operations.

Q Do you by any chance know the number of employees who were brought under the Act, the 1966 – ?

A I don't recall offhand.

Q May I finish the question? The number of employees brought under the Act by the 1966 Amendments and the number who were brought under the Act as a result of the '74 amendments?

A I don't – no, I don't know under the 1966 amendments what that figure was.

Q Well, I would like to have marked as the next [125] exhibit, number 37, a pamphlet called "Nonsupervisory Employees in State and Local Governments."

(The document referred to was marked Defendant's Exhibit No. 37 for identification.)

BY MR. DODELL:

Q I would like to show you this, Mr. Pritchard.

MR. CHARLES RHYNE: That is 1971?

MR. DODELL: That is correct.

THE WITNESS: This is quite a volume. What did you want?

BY MR. DODELL:

Q I will ask you a question. I just wanted to show it to you.

A Okay.

Q [126] May I have it back? I want to ask a question about it.

On page 40, I would like to call your attention to a passage that reads, "State and local educational institutions and hospitals which are presently covered by the Fair Labor Standards Act, counted for 3/5 of the employment in both state governments and local governments."

Now, do you have any basis upon which to question that figure?

A Where is that?

Q I will show that to you. (Indicating.)

A Well, yes, I would have to question it as it applies to local governments because what this does is to lump into one pot all of the state institutional and state hospital personnel, which is a rather substantial number, I assume, with local government personnel, which is done quite frequently with state and local funds.

They have to be distinguishable to be meaningful from our standpoint. I can tell you that from our standpoint, from the standpoint of local governments, the control that the Fair Labor Standards Act extends to local government represents a federal control of between 80 and 85 percent of the local [127] budget, because most of the local budget is made up of personnel costs. And in effect, the Fair Labor Standards Act takes out of the control of the local governments and puts into the control of the wage and hour division between 80 and 85 percent of the local budget.

Now, what that amounts to in numbers of people, it does amount to a lot in terms of ability to perform to meet political responsibilities, to carry out programs.

Q I would like to repeat the question: do you have any basis upon which to question the statement there that –

A Yes.

Q Excuse me, may I ask the question?

MR. CHARLES RHYNE: He answered, yes. He told you why.

BY MR. DODELL:

Q Is it then your answer that you do have information that questions – that calls into question that state and local educational institutions and hospitals which are presently covered by the Fair Labor Standards Act accounted for the 3/5 of the employment in both state and local governments?

A Yes, because – I am saying yes, I have reason to [128] question it. It doesn't mean anything to me.

Q But you have no basis upon which to question that factual –

A Certainly –

Q May I finish, Mr. Pritchard?

Do you have a basis to question that factual statement?

A Yes. I could pull the figures out of the census data, if I had time to do it. All I'm telling you at this point is that federal figures have a constant tendency to lump state and local sutff together; and when you lump the state educational institutions and the state correctional institutions and hospitals into one pot with local government personnel or local government budgets,

either way you distort the picture by the way it's weighted; and it is not an accurate picture in representing the case that we are trying to represent.

Q And you have factual information that –

A I can provide factual information.

Q Let me finish.

You have factual information that would contradict this?

A [129] I could provide it. I couldn't cite it out of my head. I could provide that.

Q When could you provide that?

A I know it can be provided. It would take just a relatively short period of time to dig that out.

Q Could you provide that to us, please?

A Certainly.

Q Fine; thank you.

MR. CHARLES RHYNE: Mr. Dodell, we do have these exhibits of the United States Department of Commerce. I don't want to stop you and start plowing through them – that really give a figure of 11 million for all state and local employees; and then they break it down in here, and then Harrison Williams says there are 7 million new workers covered in under these new amendments.

There are so many numbers that are bandied about, that I would really think, though, that these later figures on employment put together by the census people would give a different picture from that.

I don't want to stop him or you to go through them. We will give you these exhibits for what they are worth if you want them.

[130] MR. DODELL: Mr. Pritchard said that he could provide the information that would show this is not the

case. I would be very interested in seeing those figures.

MR. CHARLES RHYNE: I would like to get that from you so he will know what he is working against.

MR. DODELL: Yes.

BY MR. DODELL:

Q Do you have a figure as to what percentage of the employment in local governments was covered by the Fair Labor Standards Act prior to the the 1974 amendments?

A I don't have a specific figure. It was a very, very low figure, because it – in terms of hospitals, as I indicated, most of the hospitals are not municipal hospitals. They are – while they are public, they are special districts; and they are not under the control of city governments and they are not part of the city government employment figure as a result.

So it would be – I would guess it would be a fraction of a percent.

Q A fraction of one percent?

A A fracton of a percent, maybe 2, 3 percent; something like that. I would have to look that figure up, to [131] be sure. My estimate would be very small.

Q Just so I understand your testimony then, it is your testimony that only 2 or 3 percent of – excuse me, of local government employees were covered by the Fair Labor Standards Act prior to the 1974 amendments?

A I'm talking about municipal employees.

Now, if you call special district employees local government employees, then a larger percentage of them would be in that category, because all hospitals – special district personnel are included under that. That brings that percentage high.

I'm talking about – we are talking about cities and the people that this complaint represent. (Indicating.)

This represents cities. Most of those hospital employees are not city employees.

Q All right. So you're excluding from what you are talking about state employees and you are excluding special district employees?

A That's correct.

Q Are you excluding county employees?

A From this – our complaint does not deal with counties. They will be similarly affected.

Q [132] From your 2 to 3 percent figure, are you excluding county employees?

A I can't speak for the county figure. We don't deal with the county in that respect. I would have to make a calculation on that. I don't know.

Q What is the 2 or 3 percent? You use the 2 to 3 percent figure.

A There are a few municipal hospitals. I said when you take the nunber of people employed by those municipal hospitals that were covered, they would be a relatively small fraction of municipal employees.

That's why they would be small. I think the mathematics are rather obvious on that.

Q The 2 to 3 percent – you are saying – I still don't understand your answer. Does the 2 to 3 percent include county employees or not?

A No.

MR. CHARLES RHYNE: He said he couldn't answer.

THE WITNESS: I don't know what the ratio in terms of counties would be.

BY MR. DODELL:

Q I just don't understand your testimony, Mr. [133] Pritchard.

A I will try to restate it.

Municipalities operate very few hospitals. In most cases hospitals are operated by special districts as was indicated at the time the '66 amendments were passed. About 80 percent of the hospitals are private hospitals. 20 percent are public.

Of those 20 percent, very few are municipal. Consequently, when you take the very few that are municipal and relate the number of employees they have that were covered under the Act and relate them to the total number of municipal employees, the percentage is very small.

Q You are aware that employees in educational institutions were also covered by the Act?

A But educational institutions are generally not municipal employees either.

Q So then it's your testimony that this 2 or 3 percent figure you are talking about relates only to municipalities and not to counties or special districts or states?

A That's right.

Q And do you have a numerical figure for how many employees there were?

A [134] I said I would be glad to try to dig that out for you. I don't carry it in my head.

Q Do you know whether the states and the special districts and the counties and the cities to the extent of the 2 to 3 percent of employees, were able to comply with the Act after the 1966 amendments?

A I assume they have.

Q Even though there are a whole lot of regulations

that apply to them?

A I assume they have. I am not sure what the time constraints were in that application, however. They may not be comparable.

Q You think it's more difficult for a municipality to comply than for a small businessman to comply?

A I think probably it is. There are a whole host of reasons for that. I think it is.

Q It's more difficult for Los Angeles to comply than an employer of 5 or 6 or 7 employees?

A Yes.

Q And that's why the Act will visit irreparable injury – that's one of the reasons that the Act will visit irreparable injury upon the municipalities?

A [135] I think that's one of the reasons.

Q Now, for the city of Montebello, which is referred to in paragraph 57 of the complaint and is represented by – excuse me, you provide information that's included in Defendent's Exhibit No. 19; your verification with regard to paragraph 57 rests entirely upon Exhibit 19; is that correct?

A That's right.

Q Do you know how the average number of hours which the firemen in Montebello, California, worked in 1974?

A Well, he cited in here they were scheduled on a 56-hour week.

Q And we have earlier indicated – or you have agreed, have you not, if employees were scheduled on a 56-hour week, and they chose the proportion, then they would not incur any – any additional overtime expense under the Fair Labor Standards Act Amendments?

A No, I didn't.

Q I thought that you did indicate that?

A No, I didn't.

Q Could you explain that?

A I think I testified that the – that it depended on the work period that their hours were scheduled. They [136] could be working a 56-hour – what they call a 56-hour week, now, which was on a cycle or a work period arrangement that did not fit the regulations; and in order to come into compliance with the regulations, they still might end up keeping a 56-hour week, but it would cost them more money.

Q Didn't we discuss Exhibit 3 and it told if you had a 6-hour work week, you could adopt a work period and a tour of duty that would result in no overtime cost?

A That isn't the way I think it's understood.

Q Well, I would like to look at Exhibit – I think we keep coming back to this. That's how I understood the testimony earlier.

MR. CHARLES RHYNE: That wasn't my understanding.

THE WITNESS: If they are working a 60-hour week under a certain cycle situation they can change over to one of those options and not have it cost them any more.

If, however, they are working a 60-hour week on a cycle other than those that are cited in Exhibit No. 3, and have to change to come in with those two options, then it can cost them more money.

The report states that very specifically.

BY MR. DODELL:

Q [137] What was there to stop any municipality from converting to a work cycle that would result in no additional overtime cost?

A For example, the State of Texas mandates by state law that the cycle be 365 days. The cities in Texas are complying with State law. In order to change to the 7-26 day cycle, they have to change to a different system.

Q Is the city of Montebello –

A The state of Indiana has a mandatory cycle.

Q Is the city of Montebello subject to any restraint that would prevent – is the city of Montebello subject to any restraint that would prevent it from adopting a cycle that would result in no additional overtime cost?

A I don't know what that cycle is right now. If they are working on a 2-day cycle and have to move to a 7-day cycle, or if they are working on a 6-week cycle instead of a 26-day cycle, and have to move back to a 27 to 28 day cycle, then it could cost them – it could result in increased costs.

Q How could it result in increased costs?

A Well, I think that is explained in Exhibits 3 and 4.

Q I think – well –

A [138] I cited that to you.

Q Could you show me?

If we could find – here it is.

If you could look at Exhibit 3, I wish you would show me how that is explained in Exhibit 3.

A Look on page 3, under the heading, "Avoiding Unnecessary Fire Overtime."

"Even though this cycle is equivalent to an average of 56 hours a week, a city that maintains this particular cycle beginning January 1, may be liable to pay unnecessary overtime every 3rd week."

Now, that – so that cities that were in that – in those cycles had apportioned their manpower in such a way as

to have a 58 or 60-hour week and come out with a 58 to 60-hour week.

When they try to switch back to comply with these cycles, they end up having to add manpower to do it.

Now, that's a very technical thing to work out. I am not a personnel director. I am not a technician to do it; but I know that that is the fact. That is why these numbers are showing up in all of these, because everybody is experiencing that.

Q [139] Well, I asked you to explain that, Mr. Pritchard, because it seems – on the face of Exhibit 3, the passage that you read said that if a city has a cycle that is equivalent to an average of 56 hours per week, it may be liable to pay overtime; and then the example is given in the text.

However, the text on the preceding page gives ways in which a 60-hour average can be accomplished without any overtime liability.

Now, I wish you would explain to me how it can be that a municipality could have a 60-hour average and not increase its manpower and have a 56-hour average and increase its manpower?

MR. CHARLES RHYNE: Do you understand that question?

THE WITNESS: It's a very complex subject, and that's why you end up with charts like this to try to sit down (indicating) – you have to take a calendar and sit down and do it in x's and o's in order to figure it out.

As I have said, I am not a personnel director. It's not my job to sit down and work these out this way. All I can tell you is that when you put this in the hands of a [140] city manager who has to administer it, and he applies it

to his current schedule and comes up with a number and says, "This is what it's going to cost me," you have no reason to doubt but what he's telling me the truth.

You and I can argue about that in theory, but the practical matter is that city manager has to apply it and he is interpreting the statute and the rules and the possibilities as he understands them; and that's what his city is going to make its budgets on, and that is what he is going to levy his taxes on.

Q How do you explain the passage on the top of the second column on page 3, that says this kind of unnecessary overtime can be avoided by adopting a fire duty cycle at least 7 days in length, and not exceeding 28 days in length; specific examples of duty schedules that can be adopted are listed in Table 1.

How do you explain that?

A Well, they are saying here if you are within 60 hours, they have given an example of a 24-hour-on and 48-hour-off cycle of a 56-hour week. And if you are within the kind of cycle that they have illustrated, and make the change that they say, you can avoid overtime.

[141] I am saying that if you are on a different kind of a cycle, if you were on, like a Texas city with a 365-day cycle, or a 2-day cycle, and have to move into a 7 to 28 day cycle, you can end up having to have additional manpower to man those shifts.

That's where the extra costs comes in.

To move from – to illustrate that would take – would have to take a hypothetical situation and work it through in a hypothetical way, and produce an answer which would require going through a whole series of calculations like this to do it.

The communications that we have here indicate from cities who have worked through this, that they have tested it and according to their calculations, based upon what they know of the Act and the regulations, that's what it is going to cost them.

I have no reason to challenge them.

Q Can you give me an example –

A You are trying to challenge me on their data. I am saying their data, I think, is valid and acceptable.

Q Can you give me an example of any of the information that you have provided that indicates that if a city follows [142] what this bulletin speaks of to avoid unnecessary overtime, it will have to add additional manpower? Is there any example here that you can cite us to that would show that?

MR. CHARLES RHYNE: Well, Mr. Dodell, this pamphlet you are referring to is something written by the International City Management Association and put out last June 1974. An awful lot has happened since then; and he doesn't vouch for the accuracy of this report and all of these charts and everything in it.

I think you are asking a very unfair question to try to go from the generalized statement here to something specific.

He's said that he's given you the information from the people who have it about the estimated increases. I don't see how you can expect him to do more.

THE WITNESS: I will give him his answer.

MR. DODELL: Can I reply to Mr. Rhyne, please?

Mr. Rhyne, this report was prepared by William F. Danielson, Director of Personnel for the city of Sacramento, whom Mr. Pritchard did say, in Mr.

Pritchard's judgment, knows as much about the Act and its interpretation as anybody.

MR. CHARLES RHYNE: It speaks of June 1974, a [143] long time ago.

MR. DODELL: I hate to debate things that can be debated in other forums, but what this pamphlet did was it made – the assumptions made in this pamphlet were that the Department of Labor would take the most rigorous view as to the strict application of the provisions; and even making those assumptions, the report said that you could take this 24-hours-on and 48-hours-off, and you could reschedule it so there would be no additional overtime cost.

What I would like to know, is where does it say here, or where does it say anywhere, that yes, but if you did that, you would have to put on extra people?

I simply don't know that that's the case. Logically it does not seem to me to be the case.

THE WITNESS: Look on page 6, at the bottom of page 6.

There is no way to have a 58-hour cycle in a 7-28 day work period. It requires you to reduce that to 56 to make it work.

BY MR. DODELL:

Q Where are you reading from, Mr. Pritchard?

A Bottom of page 6, 1976 requirements for fire [144] overtime.

Within the 24-hour fire duty period, the 10-14 period, or the 9-15 period, there are no fire duty schedules possible that are equivalent to 58 hours, using a cycle of 7 days through 28 days.

The next lowest fire duty schedule possible

arithmetically between 7 days and 28 days is a 56-hour average schedule.

The practical effect of the law enacted by the Congress is to require a 56-hour schedule starting in 1976 rather than 58.

So that even now in order to maintain that schedule, in order to – if you are under 60, in order to work the shift schedules that are required, you have to – a city like Montebello is going to have to change its work schedules and is going to have added costs.

Q All right.

Mr. Pritchard, what this refers to is the 1976 requirement and it references the 58-hour work week?

A Right.

Q [145] If the work week is 60 hours is it still your position that if the schedules are revised in accordance with the suggestion in this pamphlet that while you may reduce additional overtime, you have to add additional manpower?

A Say that again?

MR. DODELL: Why don't you read the question back?

(The pending question was read as requested.)

THE WITNESS: Yes. It depends on what you are moving from and what you are moving to.

BY MR. DODELL:

Q Can you give any example or any documentation to show that that is the case?

A I would be glad to have – work it out and give it to you on another sheet of paper. I don't think I can sit down and work it out for you here now.

Q Would you undertake to do that?

A Sure.

Q Fine. Thank you.

MR. CHARLES RHYNE: Will you make a note of that so we will furnish it?

MR. DODELL: Mr. Rhyne, let me ask you a question, [146] not as a witness but because we have an ambiguity in the record.

Here we talk about a 58-hour per week work schedule in Exhibit 19 on the second page, and again according to Mr. Pritchard's testimony, this would exclude – or his assumption would be that this would exclude sleeping and eating time, and we have an ambiguity here.

I wonder whether it would be too much for you to try to resolve that?

MR. CHARLES RHYNE: Well, we will call and ask them, but I think you will see that – no, Rick, make a note and call Montebello, the City Attorney, we always deal with the lawyer rather than the city administrator.

We will ask him whether it includes sleeping time or not.

MR. DODELL: Fine. Thank you.

BY MR. DODELL:

Q Now, with regard to Exhibit 21 and 22, relating to Menlo Park, California, am I correct that the basis of your verifying paragraph 58 is limited to these two letters?

MR. CHARLES RHYNE: The things that are written down on the complaint here are 19 and 20.

[147] MR. BACIGALUPO: Those are the old ones.

MR. CHARLES RHYNE: Oh, okay. I am sorry.

THE WITNESS: I am sorry. This is paragraph 58 you are referring to, right?

MR. DODELL: Yes.

BY MR. DODELL:

Q Now, there is a pending question, Mr. Pritchard.

MR. CHARLES RHYNE: You asked him whether or not his information was based upon these letters?

THE WITNESS: I answered that question.

BY MR. DODELL:

Q And then I take it that you can't explain this $120,000 figure with any more precision than the statements in these letters?

A No. I think that is quite adequate.

Q Just for the record, with regard to paragraph 61, and the allegation in the complaint dealing with the additional overtime costs in its fire department, this relates – this results from the statement or is documented by the statement in page two of Exhibit 25, that speaks of a 63-hour work week for firemen?

A Yes, right.

[147-A] MR. DODELL: May we go off the record for one moment?

(Discussion off the record.)

BY MR. DODELL:

Q Let me ask a general question, Mr. Pritchard: In a number of these, for example I am looking at Sumter right now, Exhibit 26, relating to paragraph 62 of the complaint, again there is a reference to compensatory time, and without repeating the discussions that we had previously and what you said and what I said with regard to compensatory time, it would be applicable to all of those instances in which compensatory time is referred to, would they not?

A Yes. I have been giving that some thought. If I

could explore that a little more, I think I have figured out why this works out the way it does.

When you have to pay a person time and a half within a given pay period, you lay out the cash at a time and a half rate. When the person takes time off, he takes time off at a slack period when he does not have to be replaced and he is paid at a steady rate, and I think that the difference comes in that – in having to pay and also pay [148] him full time during – you know, during the regular time.

You are really doubling it up. That must be where it is – where the extra cost is coming in.

Q But the point, Mr. Pritchard, is that you can pay the person for a short week. There is nothing to stop paying the person for a shorter week during a slack period of time.

A If it is – well, I don't know whether that works out or not.

Q To take a hypothetical, suppose you pay the man time and a half for 15 hours. Then you would simply have the man work – and I am just throwing out this number, let's say – 22 and a half hours less during the summer months, to use the Salt Lake City example.

You are paying the man only for the 18 and a half hours during the summer months.

A Under the regulations you can't carry it over.

Q You are not carrying it over. You pay the man the time and a half in the winter months. Let's say the man worked 50 hours, you pay him – let's say he made $2.00 an hour. You pay him for the 40 hours.

That would be $80. Then you pay him for 10 more hours; that would be $100, and then you pay him $5

more [149] that would be $105.

He would have earned – he would have worked 10 extra hours.

Well, if during the summer months you then work him let's say for the – just as an example, 30 hours, and you pay him for 30 hours, you would be paying him $60 in the week in the summer months.

The total for the two weeks would be $156, and he would still be paid time and a half for the week he worked.

Now, obviously, here he would be getting $5 more than he would have gotten, but you could easily adjust the hours so instead of 30 hours, he would work 28 hours or whatever the adjustment would be, and the total cost to the municipality would be exactly the same. It is just that it would be laying out the money immediately and then paying less later.

Isn't that correct?

A I would have to draw that out.

MR. CHARLES RHYNE: I would be rather hesitant to make out that man's income tax return.

MR. DODELL: We could go through it again. It just seems to me this is what you were saying earlier.

[150] THE WITNESS: We probably ought to try to clarify why that comes out the way it does. Obviously, everybody that has figured it says compensatory time off – the lack of compensatory time off is going to cost them more money.

We can theorize that it will balance out. Everybody that has looked at it has come up with that conclusion. There is a reason why it is coming up that way.

BY MR. DODELL:

Q But the reason doesn't occur to either of us in any event. Isn't that true?

MR. CHARLES RHYNE: You are not making out these income tax returns either.

THE WITNESS: That is why I am saying – you know, the thing that we don't recognize, or fail to recognize is that there are 15,000 individual units of government out there who operate the way the people in those communities feel they operate best, and they have developed a whole series of arrangements to carry out their functions.

When you try to slap a uniform procedure on all of them, everybody that has ever tried to write a model national code has written one of them and has never written [151] another. They always end up saying you can't write model codes.

You can't put everybody into these stereotypes. You can make recommendations, but when you start putting them all in that same straitjacket, you are going to find they all have so many different arrangements that it is very difficult to generalize and to conclude that there will not be an impact you can't anticipate.

There are too many varieties out there.

Q But at the same time, Mr. Pritchard, it seems to me in your thinking about it and my thinking about it, we haven't come up with a reason that the government would wind up spending less under either method.

A I don't see that it is necessary for us to come up with a reason. These people that are administering it have calculated it based upon their knowledge of their local situation and their knowledge of the Act and have said that is what they come up with, and I don't know why –

whether you and I rationalize a justification for it, whether that makes any difference.

We can say they come out even. The fact is they don't come out even. There must be a good reason for it [152] according to their local situation why they don't come out even.

Q There may be a reason for it but you can't think of it?

A I don't know it is necessary for me to think of it.

Q The answer is you cannot think of it?

A I don't know offhand in each one of these situations.

Q In any of the situations?

A There may be a different reason in each one.

Q You can't think of a reason in any of the situations? Can you?

A I don't know. I probably could sit down and figure out some reasons for it, but I don't know that it adds anything.

Q Well, but I mean –

A It is not factual, it is a guess if I do.

Q You verified the complaint. It seems to me that it is pretty clear that the complaint says it would cost a lot of extra money if compensatory time were used. And we have been here now since 10:00 this morning, and you must [153] have thought about this before now. You can't come up with a reason that would explain why it doesn't come out even; is not that right?

A I verified in the complaint a set of facts. I don't know that it is necessary that I go behind every one of those facts.

Q You are assuming that what the city said is right?

A That is right.

Q But you can't explain why it is right?

A No. Not in all cases.

Q Not in any case dealing with compensatory time, isn't that right?

MR. CHARLES RHYNE: That is not true. He hasn't gone through each one of these with respect to compensatory time. We have done it with respect to Salt Lake City. That is about the only one.

MR. DODELL: I think we did it in the case of one or two more besides Salt Lake City. Then I was trying to ask the general question so I wouldn't have to go through it in the case of each one.

BY MR. DODELL:

Q [154] Is there any instance where we are talking about compensatory time where you can explain the reason why it doesn't come out even?

A Not from specific knowledge of a specific situation, no.

Q Now, in the case of Randolph, New Jersey, which is Exhibit 29, is it correct that the information relied upon to support paragraph 65 is what is contained in this exhibit?

A Yes.

Q Now, as I read this letter, there is nothing in it – in the exhibit that itemizes the number of employees who are referred to and the specific instances in which this impact on staff of volunteer boards or commissions will occur; is that correct?

A No. There are not. I think the intent of this is to demonstrate a different kind of impact than that which is cited in many of these others, which are all in dollar

terms.

This indicates that the imposition of this particular legislation disrupts a traditional way of conducting the business of the local government through he [155] utilization of lay members of boards and comnission. It will force many of these to change that way of doing business, in effect, either abolishing the boards or commissions or increasing the costs in order to carry the personnel.

Q Well, the reference here is to full-time employees serving as secretary or staff for volunteer boards or commissions; is it not?

A Yes, there is a reference to that in paragaph one, I believe.

Q Paragraph four, isn't it?

This is Exhibit 29 that we are talking about.

A Yes, this is the one that refers to stafffor boards and commissions, isn't it? That is right. This ison staff to boards and commissions, not boards and ommisions themselves.

MR. CHARLES RHYNE: Dual employment

BY MR. DODELL:

Q What I am asking is there is nothing here pecifically that states the situations that have arisen?

A No.

Q With regard to Exhibit 30, and paragrapn 66, am I correct that what you are relying upon o support paragraph [156] 66 is this letter that is Defendant's Exhibit 30?

A Right.

Q And this letter, does it not, merely states in summary form the conclusion that because of the

elimination – and I am paraphrasing – because of the elimination of compensatory time there will be an estimated annual expenditure of $100,000; is that correct?

A That is correct.

Q [157] This letter says, does it not, the fiscal impact outside of the public safety area for the City of Phoenix is relatively minimal inasmuch as the city has adopted a number of premium pay practices similar to private industry for a number of years?

A Yes, that is right.

I think it should also be noted in there, something that hasn't been referred to in the other communications, that although they have been referred to in the documents, is that there is going to be a substantial administrative cost also imposed. One of these cities indicated that it was going to have to not have computer capacity available; it was going to increase its record keeping. This one indicates it is going to have to review its job classification of individual positions for coverage under the Act. There are impositions of that kind that go all the way through this. These are burdens. Many of these will not be able – because of that time constraint, and because of the complications at the local level of bringing those changes about through public hearings and in some cases amendments to civil service statutes, perhaps even state legislation to bring them into line is something that local units are not going [158] to be able to come into compliance with immediately. That is why I said this public sector is very much different than the private sector. The board of directors of a private corporation can meet and say, "We have to comply and instruct the

staff to comply." When you have to do it through a public decision-making process with citizen participation and complying with state statutes and go through all those hearings and amendments of ordinances that require notice and so many days between readings and so forth, local units are going to have a much more difficult time coming into compliance. They are going to be subject to penalties in the meantime.

Q And was this different for state governments and special districts and counties and municipalities to the extent that they were covered by the Fair Labor Standards Act of 1966?

A I would assume that in some respects they were the same. They may have been different in some. As I indicated earlier, I don't know what the time frame was that we are working with. We are working here under about a six-day notice. As far as I know, there is no plan to provide copies of these regulations to 50 states and 15,000 [159] municipalities and 3,000 counties in the next seven days. To expect them to come into compliance in that period of time is absolutely unreasonable if not impossible.

Q Mr. Pritchard, the Act itself was adopted on April 8, was it not?

MR. CHARLES RHYNE: Signed.

THE WITNESS: It was signed.

BY MR. DODELL:

Q It was approved on April 8, was it not?

A Right.

Q Is it your understanding that it took the regulations in order to require the states and local bodies to come into compliance?

A I cited at one point I used to work on Capitol Hill. I remember Senator Muskie saying one time, before a hearing, that he would work his fanny off all through a piece of legislation, send it from the Hill down to be signed and into a federal agency; and when the regulations came back up, it was 180 degrees different from what it was when he sent it down. The local government people have lived through this so long in so many frustrating experiences, to move to implement legislation only to find that the regulations are [160] so much different than they ever expected them to be. You cannot get local government people to move effectively to comply with the details of the law until they have seen the administrative regulations. If I was in that position, I wouldn't and neither would you.

Now there is an awareness that this is going on, but no sane political leader at the local level would go to his people and propose changing work schedules. Every time you try to open up a civil service law at the local level, you are charged with political power grabbing. Every time you start trying to change salaries, you are charged with trying to increase the budget to play favors.

No sane political leader is going to face all of those retributions that go along with that until he knows exactly what he is going to have to deal with and he will have to defend it. As long as these regulations have been as fuzzy, as unavailable, and interpretation as confusing as they are, and nothing firm on the line until the 20th of December for regulations that have to be administered on the 1st of January, it is absolutely unreasonable to expect those people to move to that degree of compliance where, within seven days, they can bring this thing into

line. There is no [161] way it can be done.

Q Mr. Pritchard, you stated earlier, did you not, that the states and local bodies try to come into compliance with the provisions that came into effect on May 1, 1974?

A They tried. They are citizens. They are elected representatives. The success of their jurisdictions is to demonstrate compliance with the law. Obviously although they will differ with the law and will test its constitutionality, the general practice is to try to comply as reasonably as possible, but you can't comply when you don't have the instructions under which you are going to function. Those instructions will not be available to them.

Q They have tried to comply with the provisions that were effective May 1; is that correct?

A I think there is every evidence that in good faith they have tried to proceed. Many of them we are very much afraid are going to be challenged on the lack of action simply because there was no way for them to be aware of all of the implications of this legislation as it applied to them.

Q Well, and yet we have discussed Exhibit 3 which indicates that the National League of Cities was aware of [162] problems that you have talked about with regard to scheduling of work week –

A I am sorry –

Q Excuse me.

They were aware of problems that existed with regard to scheduling of work weeks since June of 1974?

A As was just cited here, if you proceed on the assumption that under the regulations that go into effect

on January 1 that sleeping and eating time is not going to be included in work hours, you can assume that you are in compliance with the law and you are not going to have to make any change, and the case has been argued here up through hearings in November of this year, still anticipating that there was a possibility that the regulations would exclude sleeping and eating time. There were discussions going on at the White House as to whether the Executive Office would intervene in that interpretation, and why would anybody in their right mind move out to start recruiting people and changing their budgets and levying new taxes and cutting out other programs and reshuffling priorities as long as that issue was that much alive? That would be absurd on its face.

Q Well, Mr. Pritchard, I think that the Exhibit 3 [163] indicates that – correct me if I am wrong – or let me put it this way.

We can go back again to Exhibit 3, and Exhibit 3 indicated that if a locality had a 60-hour work week, there was a way to schedule it so that the municipality would be liable for additional overtime and there was a way to schedule it so the municipality would not be liable for additional overtime, and these options were known to the National League of Cities, your organization, in June of 1974?

A And I am pointing out –

Q Is that correct, first, Mr. Pritchard?

A There was no way to advise anybody at that point nor has there been any way to advise anybody up until the 20th of this month how they could count hours for work.

Now I would not in my right mind tell a city to

proceed with its budget and to tell a city to start recruiting personnel. What you fail to understand is that on January 1 you are supposed to change from what you have had to something new with fully manned fire stations, full complements of personnel, and you don't go and recruit people overnight, nor do you go out and start staffing at $25,000 a man on the assumption that something is going to happen. When you are [164] dealing with tight local budgets and you are starting to lay off 7,000 people, like the City of New York is, you don't go out and start adding your force on the assumption that regulations may do this. You don't do it until you have got it in hand and you know what you have to deal with.

That just is not a rational way to proceed.

Q Can you answer the question, though: That as of June 1974 a city with a 60-hour work week could have known and that the National League of Cities did know that if it used a 60-hour work week one way it would be subject to additional overtime, and if it used it another way it would not be subject to additional overtime?

MR. CHARLES RHYNE: Don't answer that. He has asked that question many, many times. He knows the regulations interpreting this were not out in June 1974. He knows that no one could even dream what those regulations would be then because there had never been any such regulations on a federal level ever. So under all of those circumstances, as he said over and over again, there is no way that city officials could have, in June of 1974, known what these regulations that were issued on December 20, 1974, were going to contain.

[165] MR. DODELL: Are you finished?

MR. CHARLES RHYNE: No.

You just have talked about this June 1974 bulletin that went to a very few people ad infinitum, but it is a very speculative conjectural thing. There were no regulations at all. There was nothing on which to base the speculation.

MR. DODELL: Well, Mr. Rhyne, if you want to make your argument here, that is fine. I will reserve mine for the court.

MR. CHARLES RHYNE: You have been making yours all day. I thought I would just point out how wrong you are. You are asking all your questions based on something that is not relevant at all because there were no regulations in existence.

[166] BY MR. DODELL:

Q With regard to paragraph 67 of the complaint, and this is Defendant's Exhibit 31, the allegation of the complaint is that the Tulsa, Oklahoma, estimates additional costs in its fire department at $126,700 for 1976, and $380,600 additional costs for 1977. Do you have any information that there will be additional cost in 1975?

A No.

Q Let me ask you this, Mr. Pritchard: In paragraph 4 it states the city of Tulsa fire department now works a 240 hour work month. Do you have knowledge whether this includes or does not include sleep time?

A Not specifically. Again I would rely on the same assumption that I made earlier.

Q You assumed that it excludes sleeping and eating time?

A Yes.

MR. DODELL: Off the record a moment.

(Discussion off the record.)

BY MR. DODELL:

Q With regard to paragraph 68 of the complaint, am I correct that Defendant's Deposition Exhibit 32 is [167] what is relied upon to support that paragraph?

A Yes. That's right.

Q Do you know how many hours per week policemen in Sunnyvale averaged in 1974?

A Sunnyvale happens to be a city that operates with a public safety team. They do not work with policemen and firemen. They work with a combined department. It is an entirely different kind of a setup that operates in most other cities.

Q Do you know how many average hours a week the public safety people worked in 1974?

A No, I don't. Because it is a very specialized situation and works in a very – Sunnyvale, Oakwood, Ohio, there are half a dozen cities that operate with these combined types of departments. They have a very peculiar type of shift arrangement. There is no way to bear all of those in mind in detail.

Again I would have to rely on the fact that this is a very progressive city that has led in many administrative changes; and they are quite aware of what's going on. They have made this analysis. I would assume that their information is correct.

Q [168] Do you have any additional information as to how they calculated these figures that are stated in this exhibit?

A No.

As I indicated before, I don't know that it has been

necessary for me to go behind every one of these calculations and justify them. You know, we do this all the time, whether it is testimony on the Hill on the water pollution control costs, or urban mass transit operating subsidy needs, or whatever it is.

We make surveys, we gather the data; we rely on the caliber of the input; and we have found historically that it's been sufficiently reliable to be counted upon.

That's what we base our reputation upon. It's been acceptable in the past. I see no reason why I shouldn't count on this.

Q You don't know how these figures were arrived at?

A No.

Q Thank you.

Now in the case of paragraph 69 of the complaint, Defendant's Exhibit 33, this indicates that the city of Corcoran, California, has an 84-hour duty week; [169] is that correct?

A That's right.

I would point out in the case of the city of Corcoran this type of situation is not atypical of cities with small-time fire departments. The practice is to have one person on duty. That person eats and sleeps and just mans the station.

All he does is sit and take care of any emergency calls that come in; and advises the rest of the volunteers as to where the fire is when they call in for it.

So typically around the country, with five men, whenever you see a five-man department, what you have is usually people working 12-hour shifts with one spelling. Or 24 hours and one spelling.

In small communities, this is a rather typical situation.

The position is generally looked at as a very favorable and desirable position. The guy usually acts as secretary of the volunteer fire department, and it is as much a social activity as it is a business activity.

So when you see an 84-hour situation in volunteer fire departments, the way you and I look at it in terms of a 40-hour work week, it seems completely out of step with our [170] times; but it is a very real situation in most small communities around the country.

Q And this department has five full-time – paid full-time personnel and 17 volunteer personnel?

A That's a typical arrangement.

Q Does this 84-hour duty week exclude sleeping and eating time?

A In this case, I am sure it would include eating and sleeping time. Those people usually come on and stay right through for 24 hours. Sometimes the man will be on duty even longer than that. They practically live there. In small towns it is unbelievable the variety that you find. You find some small towns where a person goes on duty and stays there all week. He just goes in and lives. These are the kind of arrangements they make; and when you try to fit them into the kind of mold we are talking about, it is completely foreign to their way of doing things.

Q Why is it that if the assumption is generally that sleeping and eating time is excluded, the city of Corcoran is including it?

A I say when you get down to these five-man departments, five-man paid departments, when they are [171] talking about an 84-hour week, I can tell by looking at that that they are talking about that man being

on duty probably 24 hours, two or three days a week, three days a week. And they switch off.

Q Isn't it common in the case of a number of departments that people are on 24 hours straight?

A But – all I can tell you is from working with these – I used to go around and meet with volunteer fire departments and help train them; and eat their raw hamburger sandwiches with onions and beer, and I just know from having worked with them for so long that that's the way they operate. That's what that would mean.

I can just interpret it for you. I know that's what that would mean.

Q Just looking at this, you know that the 84 hours includes sleeping and eating time –

A I am sure –

Q Excuse me. Let me finish the question.

Just looking at this, you know the 84 hours includes sleeping and eating time and looking at the others, you know the figures don't include sleeping and eating time?

A That is my interpretation of it, yes.

[172] MR. CHARLES RHYNE: Can we go off the record for a moment?

(Discussion off the record.)

BY MR. DODELL:

Q In the case of Columbia, South Carolina, is it correct that the information that you have relied upon in verifying paragraph 70 is Defendant's Exhibit 34?

A That's right.

Q And the allegations of paragraph 70 make no reference to any increase in 1975 in its fire protection salary budget. The only reference in the paragraph is to

paragraph – is to 1976. At least the only specific reference to any dollar amount.

Is there any indication as to how much, if anything additional, the amendments will cost Columbia, South Carolina, in 1975?

A No. I think they have indicated that there will be some overtime compensation, but it will not be a major item in this year. It is the next year that becomes critical for them.

Q Do you know what the work week is in Columbia, South Carolina, for firemen?

A [173] Not offhand.

Q Did you know it at the time you verified paragraph 70?

A No. I don't know that it was necessary for me to know it.

MR. CHARLES RHYNE: You were asking other than police, I take it, because they said they had a 42-1/2 hour work week for police in the fourth paragraph.

MR. DODELL: Yes, Mr. Rhyne. The allegation in the complaint deals specifically with the fire protection salary budget for 1976; and so my question related to the fire protection budget for 1975 and asked whether there was any specific dollar figure that could be associated with that.

Mr. Pritchard's answer was there was not.

MR. CHARLES RHYNE: Okay.

BY MR. DODELL:

Q Now with regard to paragraph number 71 of the complaint, am I correct that Exhibit 35 is the sole basis of the allegations of paragraph 71?

A That's correct.

Q Do you know what the average work week for [174] firemen was in 1974 for Richmond?

A No, I don't.

Q And do you know how Richmond arrived at the figure of $161,000?

A I assume that they based that on the – on what the law would require and on the basis of what their situation now is. Again I see no reason that I would expect to go behind that to check their calculations.

You know, I think I should point out again that we could supply a whole stack of these. It would be ridiculous to supply 1000 or 1500 or 5000 or 15,000; and it would be even more ridiculous if you gathered the data to assume, when it was furnished, that we would go behind every one of those calculations. You don't do that in a survey.

The Department of Labor doesn't do that in surveys it does. It accepts the information that is sent in. You don't go out and verify it all.

Q Mr. Pritchard, your verification of paragraph 71 is solely due to the fact that Richmond has stated to you the conclusion that it will cost $161,000 for the period January 1, 1974, to June 30, 1975; is that correct?

A [175] That's correct.

Q Now with regard to paragraph 72 of the complaint, am I correct that Defendant's Exhibit No. 36 is what you are relying upon to support paragraph 72?

A That's correct.

Q Now do you know what the average number of hours is that policemen in Reidsville, North Carolina, worked in 1974?

A No.

Q And do you know the average number of hours that firemen worked in Reidsville, North Carolina –

A No.

Q Excuse me. May I finish the question, please, Mr. Pritchard?

A Yes.

Q Do you know the average number of hours firemen worked in Reidsville, North Carolina, in 1974?

A No.

Q And do you know how Reidsville, North Carolina, calculated the estimated increase in costs other than what is stated in this letter?

A I assume they calculated on the basis of their [176] current employment situation and the best information they had from the rules and regulations that would apply for the next year. I have no reason to doubt but what that is correct.

Q You have no other information as to how they calculated their estimates other than what is in this letter?

A I assume that they would not lie to me and that what they have given me is accurate.

MR. DODELL: Could you read back the last question, please?

(Whereupon, the Reporter read from the record, as requested.)

BY MR. DODELL:

Q Can you answer that, Mr. Pritchard?

A I thought I did.

Q I don't think you did.

A I said no, I had no other information. I had no reason to believe that what they gave me was incorrect or

that they would lie to me. I feel perfectly confident in relying on it.

Q Yes.

Now, Mr. Pritchard, in these estimates that have [177] been made of the increased – or alleged increased costs due to the Fair Labor Standards Act Amendments, do you know whether the localities took into account administrative and executive and professional employees who may be exempt under 13 (a) (1) of the Fair Labor Standards Act?

A It is my understanding that they did.

Q Do you know of your own knowledge whether they did or not?

A I think that – given the fact that that was defined in the May 1st legislation, that it applied effective May 1st, and what we have been talking about is primarily 1975 budget material, those units that have made their estimates for next year would have been expected to take that into consideration.

I would feel confident that they have.

Q Do you know that of your own knowledge, or is that an assumption that you are making?

A Well, I think they – I think it has to be – I think it has to be an acceptable assumption. On any of this data, you provide them with copies of the material. They analyze it and they make their reports based upon the information provided them; and I would see no reason [178] to assume that they would make it on any other assumption.

Q So then it is an assumption; you don't know it of your own knowledge?

A No. I think it is a reliable assumption, however.

Q But you do not know it of your own knowledge; is that correct?

A No.

Q Now with regard to the allegation of paragraph 44 – oh, excuse me, before I get to that –

MR. DODELL: Mr. Rhyne, you kindly referred to the fact – you were kind enough to refer to the fact that you had documentation for other paragraphs, or all the paragraphs, or other documentation.

If you will – want to turn that over to us, we would be happy to receive it. I won't propose to have it marked at this time; but –

MR. CHARLES RHYNE: All right. Why don't we, at the end of the deposition, give it to you then? I think we have documentation with respect to fact stuff that was included in there; like we say, the city of so-and-so estimates so-and-so. We always have that document that [179] makes that estimate.

MR. DODELL: I would prefer you could turn it over now so if anything strikes my eye so during the limitations, I could ask about it.

MR. CHARLES RHYNE: I think that actually haven't we given it all to him that relates to factual stuff?

MR. BACIGALUPO: Yes.

MR. DODELL: I have all the material that Mr. Rhyne referred to earlier; is that correct?

MR. BACIGALUPO: Yes.

MR. DODELL: Thank you very much.

BY MR. DODELL:

Q With regard to paragraph 44 of the complaint that talks about – on page 20, that talks about an ICMA study, it refers – it alleges that – and I am paraphrasing

– about 15 percent of the cities sampled an average number of hours per week greater than 60 hours presently required. That's correct, is it not?

A Right.

Q Do you know whether that – do you know what percent of the fire fighters are included in that 15 percent [180] of the cities?

A Without looking it up, I don't recall the number exactly.

All of that information is contained in Exhibit 4.

Q Do you know whether Exhibit 4 includes the number of employees that would be in those cities?

A I believe it does.

Q Well, I won't take the time now. We can check Exhibit 4 to see whether it contains the number of employees in the 15 percent of the cities.

Let me ask you this, Mr. Pritchard: Why is it that 85 percent of the cities can get by with 60 hours for fire fighters and 15 percent cannot?

A Repeat that again.

Q Why is it that 85 percent of the cities can get by with 60 hours for fire fighters and not the other 15 percent?

A That's just part of the unique character of this country. Everybody doesn't do everything the same in every community.

A city with a – some of it is a part of local custom. Some of it is a part of state mandates. Some of it [181] is the character of the community.

A –communities like Sunnyvale, and Oakwood, which are largely residential communities with practically no industry, it is not uncommon for the fire department –

the fire truck not to be out of the station once a month, even on a false alarm.

And the kind of duty that the men work is quite different than in a major city where firemen may be called out 10 or 11 times a night; and the kind of pressure and the kind of experience that the people have indicates that they need different kinds of systems to meet different kinds of conditions.

Every city isn't the same. So the conditions vary.

Q Have you made any kind of analysis to determine what kinds of cities fall within the 15 percent?

A No, I haven't.

Q You are just speculating?

A No, I am not speculating. I am basing it upon 28 years of experience in working with local governments and local fire departments and looking at and analyzing local administrative systems and working with the fire [182] insurance rating system, which influences the kind of fire insurance rates that people pay and the kind of departments that they have.

Counseling with cities, providing them information – I can say to you that the variety around the country is based upon state laws, on local customs, on the kind of communities and the kind of fire conditions and the fire hazards that exist, and the frequency of the burdens that are imposed upon them.

Q Have you ever made any study of which fire departments have – which fire departments fall within the 15 percent that –

A No –

Q May I finish the question, Mr. Pritchard?

Have you ever made any study or inquiry into the

matter of which cities or which kinds of cities fall within the 15 percent that work their employees more than 60 hours?

A I have never seen that 15 percent figure until it came out in here. That figure is changing constantly. The departments move from volunteer to paid, paid to volunteer; they change from one hour level to another hour [183] level to another hour level, based upon local negotiations; and there would be no reason to make that kind of an analysis. It would have no use. That is as far as the cities are concerned.

I might add that some cities that are down near the bottom of the scale, for example, the city of Seattle at this point is approaching a 40-hour week in negotiation with its firemen, without regard – in fact, they didn't want the Fair Labor Standards Act to pass because it destroyed their ability to negotiate a 40-hour week. They are looking at a 40-hour week; and in doing that, they are creating a situation where the firemen – and this is an example of local diversity and local experimentation, that this destroys, they are creating a situation where the firemen are being trained also as building inspectors; and instead of having fire inspectors and plumbing inspectors and building inspectors all pouncing in on people that have to have their properties inspected, the firemen in their own duty, but off call time, are going to function by their own agreement as building inspectors. And this will reduce the costs of maintaining a building department, give the public a better service, give the [184] firemen something to do instead of sit around the station all the time.

It is a much more wholesome situation, much more

economical, much more efficient for the community; but given the provisions in here, in the 20 percent requirements, they will not be able to do that now.

Q Mr. Pritchard, I am not sure I understood your answer to the question.

Why is it that 85 percent of the cities can get by with less than – 60 hours or less, and 15 percent have to work their firemen more than 60 hours?

A Because – and I assume in those 15 percent of the cities that work more than that, that the conditions in the local community and the agreements with the firemen have been such that they agree that that's the best thing for the community.

Q Have you ever made a study to see whether there are cities similarly situated, some of which are – work their employees more than 60 hours, and some of which work their employees less than 60 hours? Have you ever undertaken that kind of study?

A A survey of the cities that work more and some – [185] and the ones that work less?

Q Yes.

What I asked you is have you ever studied to determine whether there are cities that have similar characteristics, some of which work more than – work their fire fighters more than 60 hours, and some of which work their fire fighters less than 60 hours?

A I answered that once. I said no, I said I didn't think it would serve any useful purpose.

There are people that glory in uniformity. Local government doesn't fit that mold in this country. It is not uniform.

Q Is it possible, Mr. Pritchard, that cities can save

money by having more than a 60-hour work week as against other cities that have less than a 60-hour work week?

A That cannot be answered that easily because the length of the work week, a whole lot of other conditions that relate to it have an effect upon the fire insurance rating, which also has to be taken into consideration; and that is something that is very difficult to calculate and answer categorically. It is not just a question of [186] whether you work more or less hours. There is an offsetting factor in fire insurance rates that are determined under a rate system that relates to the quality of the department, including hours worked and a lot of other things. Those things all have to be put on the scale as to where those things come out.

Q How does that affect the amount of money that it costs the locality for fire protection?

A Well, there is a system known as the fire insurance rating system. Every fire department, every city is rated by the insurance underwriters – not the underwriters, it is ISO. I forget what that is. It was changed from the National – it is Insurance Service Organization, I think that's what it is. It used to be the Fire Insurance Rating Bureau.

They go in and look at every community. They are engineers. They check the equipment, the building codes, the water supply. They check the number of hours the firemen work; they check the training; they check the police support on the fire department.

All of those things are weighted; and for everything that you fall below a standard, you are given [187] deficiency points. The deficiency points determine where

you stand on the ratings scale; and if you get a rating 8 – the District of Columbia, I believe, has a rating 1, as a matter of fact. One of the few cities in the country that does.

But if you get a rating 2, you pay the insurance rates, the classification, the base upon which the rates apply is higher; and so you pay more for your insurance rates.

If you get 3, you pay more; if you get 4, you pay more. Some cities go as high as 7 or 8. The highest you can go is a 10.

When a city tries to determine how much it is going to invest in fire equipment, how many men it is going to put on a pumper, how many hours they are going to work, what kind of investment they make in training, all of those things have to be put on the scale and weighed against what kind of costs are going to be approved for the community as a whole in terms of insurance ratings.

Q Does the city pay the insurance?

A No, the private individuals pay them, but it is another kind of a tax, if the city doesn't maintain an [188] adequate fire department, then the citizens are taxed for their insurance rates.

Q [189] In terms of cost to the locality, it is possible, if a city works its firemen more than 60 hours it will cost the city less?

A Well, it might cost the city government less, but it doesn't cost the city less.

Q It might cost the city government less?

A That is right, but elected officials have to answer when the people's insurance rates go up because their fire protection is inadequate. That's not a very comfortable place to be in.

There are very few officials who are going to make a decision that results in the fire insurance rates going up and having to face that. It is as bad as having the tax rates go up.

Q If it costs the city more for – excuse me. If it costs the city less when it works the firemen more than 60 hours a week, might not the city need less tax revenue, or revenue from other sources to run its functions?

A Well, that is possible. They also might have to face the fact that the insurance rates go up, too.

Q And is it not possible also that they might then have lower taxes?

A [190] Well, it is possible.

Q So, it is possible that as a result of working firemen more than 60 hours a week, the city may have lower taxes?

A Well, I suppose that is true.

Q Now, do cities try to attract industry or residents or retirees on the basis of its – of their tax structure?

A I think that that is often talked about, but the fact of the matter is that the tax rate have very little to do with the attraction of industry. Most public officials recognize that.

Q Where is that documented?

A Oh, it is documented in hundreds of studies. Private industry will tell you that. Private industry would rather pay higher taxes and so would the general public and have good public services and good public schools and good streets and recreational facilities.

Q Could you give me one of the studies where that is documented?

A I don't have them with me, but there are many of

those where that has been done.

Q [191] Are there publications that list comparative tax structures of states, comparative tax rates so that people can make judgments, for example, about where to retire?

A There are on a state-by-state basis. I don't know of any that go into comparative studies down to the local level.

MR. CHARLES RHYNE: Did you hear that last part of the question? So people could consider that in connection with retirement?

THE WITNESS: I don't know that that is available for any purpose at that level.

BY MR. DODELL:

Q Do you know whether cities advertise as to what their tax levels might be in order to attract industry or attract people to those places?

A Oh, I think occasionally. I would hate to see that in 15,000 that somebody didn't.

Q Some may?

A Some may. I am saying it is not a critical factor in decision making as far as industrial location is concerned.

Q That is an opinion of yourself?

A [192] No. I think it is documented. You have asked if we could supply anything. We have a whole library of stuff over there. We can load the room with it if you want it.

I mean any company that does plant location, any expert that you talk to will tell you that one of the fatal mistakes that local governments have made in the past on occasion is to try to get their tax rates down to try to get industry and let the public services deteriorate to the

point people don't want to live there.

That is why poeple leave.

Q So, local governments have thought they could lure industry by keeping down their tax rates?

A They say that has been an expression in the past. That has not been a prevailing opinion for many years.

Q When did it stop?

A I think since probably World War II.

Q Is that documented any place?

A Well, I can try to find you some documentation for it if you think that is important.

Q If you can come up with that, I would be very interested in seeing documentation on those two points.

Are there any cities that might be concerned about [193] the fact that they are paying their employees more and giving them more premiums for overtime than other cities?

A I think the big effort probably with the cities is trying to keep their salaries up with the private sector and with the Federal Government.

Q What I am asking you is are there any cities that are concerned about the fact that their brother cities may be paying less to employees or giving them less in terms of fringe benefits and overtime and the like?

A Do I understand you to mean that – are they trying to get – to hold their salaries and wages down and fringe benefits down to what a lower paying jurisdiction is paying? Is that what –

Q No. My question is: Might city "X" not resent the fact that city "Y" may pay lower salaries and afford lower benefits or less benefits that it does?

A I don't think that is the primary problem that most

of them deal with.

Q Is it a concern?

A I don't think it is – I would have to say it is a very insignificant concern. I suppose they look at that, [194] but the general experience is that cities are very hard pressed to recruit top quality personnel, and that they are so constantly competing with the private sector and the Federal Government in securing quality personnel that they are constantly having to push their salaries up and the people who drag behind are always trying to catch up.

It is not a case of the low ones pulling the top ones down. It is the top ones pulling the low ones up.

Q There is not much competition with the Federal Government or with private industry if you want to work as as policeman or fireman a 60-hour work week, is there?

A Well, I can say this though, that if you go into a city – and you pick the city – I don't care which one you pick. If you go into a city where the firemen work 64 hours and the policemen work 40 hours, you will have none on the waiting list to be a policeman and you will have a couple of years supply of people waiting to get on the fire department to work 64 hours.

I don't care which city you pick. You name it.

Q But are any of these competing with – well, the 64-hour firemen list, they are not competing with the Federal Government or private industry, are they?

A [195] In some areas they are, yes. It is a very desirable position, and I can say to you that the firemen – the reason I said earlier that the firemen do not want their hours – did not want this legislation is because

when they are working a 60, 64, even a 72-hour work week, so-called, they were able to hold enough outside employment to earn double what they earned in their employment. They do not want to lose that opportunity, and when you reduce their hours, what they are being forced down to is a straight shift basis, gradually, which is going to eliminate their potential for outside employment, and they don't like it.

Q What is that information?

A Oh, that is so – that is such a prevailing common view that it is just generally known.

You can get on the phone and almost any painter that you call in the phone book, in the yellow pages, will end up being an off-duty fireman.

Q Can you document that in any way?

A Yes. It is such common knowledge. Firemen – this is historical. Firemen have worked on off-duty time. They work their shifts so that they work three days in a row, even though they should have 24 on and 48 off. They [196] bunch their shifts so they work 72 hours in a row and take the rest of the week off and run a private business and collect Social Security.

That is why they never wanted in under the Social Security system. Firemen are still, except in a very few states, not under the Federal Social Security program, because they want to be under their own pension programs and then they run a private business on the side and come under Social Security.

And they are under two systems, earning twice the pay.

Q And that is common knowledge?

A Oh, that is common knowledge. Everybody knows

that.

Q And the International Association of Fire Fighters or whatever the national union is called, – is that the correct title?

A International Association of Fire Fighters; they know that. Certainly they do.

Q They supported this legislation?

A Certainly. That is why they lobby the legislation at the state level to insist that the hours – that [197] shifts for firemen have to be on 24-hour duty shifts, because they don't want this legislation. They have this at the federal level. They don't want the legislation to be – the hours to be pushed back in such a way that they have to work eight-hour shifts.

Q Mr. Pritchard, the International Association of Fire Fighters – is that the name of it?

A Right.

Q They lobbied for this legislation, is that correct?

A The national union did. Many of the local councils did not.

Q You don't know how many, though?

A Well, there was – there was testimony submitted to the Congressional committees. I suppose that could be looked up. I don't know how many filed statements. There were a number of –

Q So, it is your view, based on common knowledge, that the firemen don't want the statute, and then it follows it seems to me, does it not, that the International Association of Fire Fighters then doesn't know what its membership wants? That is your position, I take it?

A [198] I don't know that – what the purpose of that statement is in this record. I have some opinions as to

why this was done, but I think they are unrelated to this case.

Q Well, Mr. Pritchard, you volunteered not in response to any question that I asked that you know what the firemen want as a result of common knowledge.

I didn't ask you any question to induce that. You simply – excuse me, may I finish – you simply decided to say that.

And so, what I am saying, asking you is, is it your opinion that you know better what the firemen want than the International Association of Fire Fighters.

A You asked me why – what the national union was doing and why they represented that opinion. I have some opinions as to why they did it, but that is speculative. I don't see that assigning that to this record would contribute to this discussion.

Q Well, let me ask the question again. I think it can be answered. Is it your view that what you represent to be common knowledge about what firemen want is a more accurate reflection of what they want than what the International Association of Fire Fighters –

[199] MR. CHARLES RHYNE: You are arguing with the witness. I think you are way off any possible issue here.

MR. DODELL: I asked the same question three times.

MR. CHARLES RHYNE: And you argued three times.

MR. DODELL: Excuse me. Mr. Pritchard has been unwilling to answer it. Excuse me. The question that I am asking is asked because Mr. Pritchard volunteered some comments that have nothing to do with any question I asked.

MR. CHARLES RHYNE: He answered your question.

MR. DODELL: Excuse me. I followed it up with a question. If Mr. Pritchard doesn't want to answer the question, let the record stand if he answers it, it would save a lot of time.

MR. CHARLES RHYNE: You have been arguing all day with the witness. When you get – rather than asking questions.

When you get a response, you don't like, you keep on arguing. I think we ought to move on to something else.

MR. DODELL: Your view then, is that Mr. Pritchard has answered the question?

[200] MR. CHARLES RHYNE: Yes.

MR. DODELL: The record will reflect, my view is that he has not answered the question.

MR. CHARLES RHYNE: Well.

BY MR. DODELL:

Q Do cities view themselves in competition in seeking to attract industry or seeking to attract residents or seeking to attract retirees?

A I can't answer that categorically, because if you are aware, if you have been reading the newspapers, you know in this area, for example, a number of communities that are trying to adopt no-growth policies where they don't want more population and they don't want more growth.

The situation varies all around the country from city to city, and unit to unit. It makes the conditions different every place.

Q Do some cities deem themselves in competition with other cities in seeking to attract industry or residents or retirees?

A I assume they do in some cases. It is not something you can answer categorically, though.

Q Well, I don't understand what you mean when you [201] say you can't answer it "categorically," Mr. Pritchard.

MR. CHARLES RHYNE: Quit arguing with him now. Tell him – you keep arguing with him. All day long you have been arguing. Why don't you tell him what you mean by "competition"?

He answered your question. Then you go on and on asking the same question.

MR. DODELL: Mr. Rhyne, you can make objections; I will conduct my questioning. I will do it best I can.

MR. CHARLES RHYNE: Yes, but just stop arguing with him all the time.

MR. DODELL: I assume you will do the best you can. I think the record will show in many instances Mr. Pritchard has volunteered gratuitious remarks, that have not been responsive to the questions.

MR. CHARLES RHYNE: I don't agree with that at all.

MR. DODELL: I know that.

In this instance, I simply don't understand what Mr. Pritchard means.

MR. CHARLES RHYNE: You are way off in the wild blue yonder on something that has nothing to do with this [202] case anyway.

MR. DODELL: I wish you would let me finish. I am a very impatient person generally, and I tried to restrain myself from interrupting Mr. Pritchard when he is going on being unresponsive. I wish you could extend the same courtesy.

MR. CHARLES RHYNE: I think you are arguing with him. Why don't you ask questions?

[203] BY MR. DODELL:

Q Mr. Pritchard, I don't understand what you mean when you say that the question, do some cities deem themselves in competition with other cities in seeking to attract industries or residents or retirees, cannot be answered categorically.

What do you mean it can't be answered categorically?

A I just cited the fact that there are a number of cities around the country – Boulder, Colorado; Petaluma, California; Fairfax County out here – there are many of them around the country, a number of them in Florida, that are – that have been acting to initiate no-growth policies because their environmental conditions have reached the point where they can't and don't want to absorb more population or more industry or more business.

Now, I can't categorically say that cities are across the board in competition with each other. There are some cities that are growing; there are some cities that are stable; and there are some cities that are aging and declining.

Cities have a life cycle just like people do. When they are young and growing, they are expanding, they are trying to attract industry and residents and so forth.

[204] There is a growth cycle that they go through. There is a point at which they stabilize, they become surrounded; they can't grow any more. And then there is a point at which they start to decline and start to renew themselves. They are all in a different stage of development.

Some are trying to get new residents, some are trying to attract businesses; some are trying to hold businesses. They are in different stages of development, growth and

change all the time.

You can't categorically say that they are all trying to attract residents or business or industry.

MR. DODELL: For the record, and in light of Mr. Rhyne's prior observation, the record will reflect that the question was: do some cities deem themselves in competition with others in attracting industry, residents, and retirees.

The question was not: do all residents – do all cities deem themselves in competition.

Excuse me, Mr. Rhyne. I again think lawyers should maintain a degree of courtesy to each other.

MR. CHARLES RHYNE: I wish you had a little of it.

MR. DODELL: You interrupted me several times in a row. I would like to start my observation again because [205] I lost my train of thought, due to your interruption, Mr. Rhyne.

The question was: do some cities deem themselves in competition with others in attracting industry, and residents and retirees.

Mr. Pritchard gave a lengthy dissertation on whether you can say that all cities deem themselves in competition. That was not the question. That was typical of the nonresponsive answers we have been getting today.

MR. CHARLES RHYNE: And it's typical of the kind of questions you have been asking. You say some cities. You are talking about 15,000 cities. You might mean 2, 3, 4, 5, 10. That's the kind of questions you have been asking.

So how in the world can you expect a man who knows more about city government than anybody else to answer questions such as that? You have to be – if you ask a

general question, he says it can't be answered that way.

MR. DODELL: Mr. Rhyne, I think you are testifying if you are saying that Mr. Pritchard knows more about city government than anybody else. You are not a witness here. You are not sworn. That's just your observation.

MR. CHARLES RHYNE: Well, he knows more than you do.

[206] MR. DODELL: Well, that's why he's the witness and I am a counsel.

BY MR. DODELL:

Q Mr. Pritchard, I will take up Mr. Rhyne's suggestion.

What percentage of these 15,000 cities are in what you call the growth stage, and are seeking to attract industry and residents –

A That's an impossible question to answer.

Q Excuse me. For the record, that's the question Mr. Rhyne said I should be asking.

MR. CHARLES RHYNE: No. You are asking questions that really don't have anything to do with any issue here, of such a general character that they are impossible to answer.

When you look at 15,000 cities, I mean, you ask a broad question and don't like a broad answer.

BY MR. DODELL:

Q Mr. Pritchard, is there a substantial number of cities that are seeking to attract industry and residents and retirees?

A Again, when I look at 15,000, what is substantial? 10, 20, 50, 100, 1000, 50 percent? I am saying that, you know, you are asking a question that is a typical layman's [207] question of how cities function and how they develop and how they grow.

Cities do not sit in a situation where they are and set up a policy that we are going to attract old people, retirees, we are going to attract industry, this; and launch on a campaign and go out and look at what everybody else is doing and manipulate their tax rates and all their policies to deal with that.

That isn't the way cities function. That isn't the way they work.

It's just an unanswerable question; that isn't the way cities function. Cities are responsible to do – to provide a set of services and create an environment for people who live in them and to make an attractive place for people to work and live and recreate, and for where industry is looking for a place to go, to provide facilities and so forth for those industries; or people to build homes, whatever it happens to be.

Now, it does happen that a city – that an industry will begin looking around for a location, and they will look at a city, and a city will try to sell them on a particular location; and in some cases by state law, cities are permitted [208] to give certain kinds of taxes – certain kinds of incentives or write-offs or extended assessments, low assessment, or something for an industry, as in the case of Kansas City, for example, under Missouri law to build something like the Crown Center or the Quality Hill development projects.

But they don't set an across-the-board, low tax rate for the purpose of holding out a butterfly net to catch any industry that happens to be floating around.

It just doesn't work that way.

Q Mr. Pritchard, that was not even the question. The question was – there was no reference to tax rate in the

question.

The question was: is there a substantial number of cities that tries to lure new industry, new residents and retirees?

A You started your question, though – the series of questions by talking about keeping their tax rates down for the purpose of attracting industry. That's where the series started.

I'm trying to point out to you that, sure, there are cities that are growing, that need new industry. They want increased population. They have facilities to [209] accommodate them.

The city of Cleveland has a sewage treatment facility that is only operating at 70 percent of capacity. Obviously it would like to attract population and industry that would meet – would fill that capacity. That's true.

But the city of Cleveland doesn't sit there, on the other hand, shaving its tax rate, cutting it down to a bare minimum, underpaying people, all of this stuff to try to get an industry. It doesn't work that way. The system doesn't work that way.

Q Let me ask you this, Mr. Pritchard: let's say there is a city that is in the stage that you spoke about that wants to attract industry; and let's say that it has a work week for firemen of less than 60, and a work week for policemen of less than 60.

And let's say that it has a tax structure that goes along with that work week, those work weeks.

Suppose that another city has a work week for firemen of more than 60, and a work week for policemen of more than 60, and is also trying to attract industry.

Of what interest would it be to the first city to try to see to it that the second city could continue to employ [210] firemen and policemen more than 60 hours a week?

A That's too hypothetical a question, unless you could – I would – it's just too hypothetical a question to answer, because there is no way of knowing how that would relate to anything else in the community, the quality of fire service, the costs, the insurance rates.

There's no way you can answer that question on that kind of a set of facts.

I know what you are trying to get at. I appreciate what you are trying to get at. If I could answer the question so you could have a yes or no answer based upon what you are trying to do, I would be glad to do it.

But you are coming at it in a very naive way which just doesn't fit the real world. You are trying – what you are trying to do is get me to say that if cities worked their firemen 64 hours instead of 56 hours, they will be in a better position to compete for industry because it keeps their taxes low.

And I say to you, you cannot create that kind of a condition because that isn't the way a city functions, because there are too many other political ramifications; there are too many other costs that are related to it that [211] offset it on the other side. And decisions are not made that way.

Q But I am asking you this question, Mr. Pritchard: if there is another city that has a 56 week – let's assume you are right for the moment. Let's assume that the city won't maintain a 64 hour week for that purpose. Let's assume for the sake of argument that's correct.

If another city thinks it should only have a 56-hour work week, and if that – both cities are interested in attracting industry, why would the 56-hour city have an interest in defending the right of the 64-hour city to continue a 64-hour work week?

A I wouldn't –

Q What interest would it have –

A Probably the only thing I could – the only answer I can give you is that elected leadership of cities have consistently argued for the right of home rule. They have also argued that the conditions of – the conditions of work, the ways things are financed, the way programs are worked out is a matter which they, as locally elected officials responsible to the community as a whole, have to work them out.

[212] And they very much resent – and this has been historical – they very much resent the state legislature and the federal government coming in and telling them that they have to handle their business in a certain way.

They would generally say that if that city wants to operate its fire department in a certain way, if it wants to use 1956 fire trucks, and have its people work 60 hours a week, and wants to pay them twice as much for it, or whatever it happens to be, that's their business. That's their community. That fits the needs of that particular community and that's what the community wants; and they have to stand for election and defend it.

The Wage and Hour Division doesn't stand for election; I don't stand for election; you don't stand for election; but those local officials do. They are answerable to that community for the tax rate, for the quality of service, for the way they treat their personnel.

When we come in from here and try to put somebody in a regional office of the Wage and Hour Office out there, and tell them how to structure their fire department and not be responsible for the taxes, for the quality of service, or the insurance rates, that isn't what they understand and what [213] this country has understood to be the home rule concept, of a decentralized concept of federalism.

That's what the issue is. What we are talking about is power.

You are trying to talk about dollars. We are talking about power.

Q How have you ascertained that the cities that have lower than 60-hour work weeks and that would not have additional overtime obligations as a result of the Act agree with your view that the autonomy of other cities should be preserved?

How have you ascertained that?

A I have never, in 28 years, seen a city official whose employees work less and get paid more than an adjoining city or any other city in a jurisdiction. Go into a state legislature, for example, and try to support legislation, even though it was introduced by somebody else, to impose the same conditions on another municipality to make them even.

That is not the concept under which our system works.

Q [214] Mr. Pritchard, let me ask you again how do you know that – let me ask it more directly: How do you know that your membership supports the position you are taking in this litigation?

A Well, in the first place when this issue came up the – I took the matter and we gathered some of the facts on

it. I took the matter to our board of directors which is elected by our membership. The board of directors unanimously instructed us to proceed for the development of this case.

Secondly, we had a meeting here in Washington last March after this legislation was reported by the House committee. At that point we had done everything we could to represent a policy position adopted by our membership a year earlier to defeat the legislation in the Congress. We were arguing among other things on its unconstitutionality.

We assumed at that point that it was so far along that it could not be passed, and with some 1,500 local government officials here in town, we proceeded with a meeting on several other subjects, and the delegates were so upset they took the agenda away from the program that had been developed and made this issue the No. 1 issue. They spent all their time on the Hill trying to influence this [215] particular issue, because they were so opposed to it.

We just finished a meeting with some 4,000 local government officials, elected officials, mayors and councilmen in Houston, our annual Congress of Cities. These are people who come with credentials from their local mayor and council. He comes as a credential delegate from his elected governing body to that meeting, and they – we felt the legislation was passed, and we were in the courts, and we ought not to say anything more about it. Those delegates took it out of the hands again and passed a policy position – not a resolution, but a stated policy position – calling for repeal of the legislation because they said it is not necessary and it is

none of the Federal Government's business.

Q When was this?

A This was just the first to the 5th of December.

Q Of this year?

A This year.

Q There were 4,000 delegates?

A That is right.

Q Representing how many municipalities?

A [216] I don't have the whole tally yet.

Q Was there a vote?

A Oh, yes.

Q What was the vote?

A It was unanimous.

Q Unanimous vote of the 4,000?

A Unanimous.

Q Were your proceedings recorded?

A That is right.

Q And the 11,000 municipalities were not represented?

A Well, all of those municipalities are represented through a voting system. Some of the voting delegates are elected from all of the municipalities in the state, and they are representatives of all those municipalities, coming from the state. So every municipality doesn't have to be there. The municipalities collectively select a group of delegates just like the states select – people in the states select a group of delegates to go to a party convention. Everybody in a party doesn't go to the national party convention. They go as delegates representing the people in the state.

So they are all credentialed delegates representing the local governments in that state.

Q [217] Is it your view that the position taken in this litigation represents the view of every one of the 15,000 municipalities that are your members?

A I wouldn't want to say there is somebody that takes exception to it. As a matter of fact, I am sure there is. I am sure I could go out and find half a dozen people that would take a different view, for one reason or another. We have some members of city councils and some mayors who may very well be presidents or organizers of the local labor union who very much believe in this. I am saying out of the delegates that have come to these meetings over the years and have considered this legislation, the vast majority of them – and in any other system all you need is a majority. We can't even adopt a policy except by a two-thirds vote. We don't adopt things by a majority. Unless we have a two-thirds vote they aren't adopted. When you get something like that with two thirds, or unanimous in a group of that kind, I think that is a pretty representative opinion. You can't destroy that credibility with finding a half a dozen people around the country to disagree with it.

Q Your complaint refers to the fact that a number of the states have regulations of various kinds with regard to [218] the municipal governments.

By the same reasoning under which –

A My complaint?

Q The complaint in the case, this document that was filed.

A Oh, I see. All right. Okay.

Q The complaint –

A I thought you meant I was personally complaining.

Q No. I mean the complaint filed by the National

League of Cities.

A Yes.

Q That complaint refers to the fact that some of the states have regulation of municipalities, hours and working conditions.

Does the same reasoning indicate that the cities believe that the states should not be regulating their hours and working conditions as well?

A That is true. The city viewpoint is that the people that have the responsibility to administer the programs that are elected have the responsibility to administer the programs to raise the taxes, to allocate the resources, should not be imposed upon by the states enacting legislation [219] without providing the financial support to go with it.

Now where the states have come in and mandated hours of work, without providing resources, that is a position that the cities have traditionally opposed in the state legislatures.

Q So as a policy matter cities make similar argument against state regulation as they make against federal regulation here.

A That is correct, but there is a different basis for it. You have to understand there is a different basis for it, a much different basis.

Q Well, what do you mean there is a different basis for it?

A Well, the states have the right to do it, if they want to do it because the cities are instrumentalities of the states, but the states and their instrumentalities are in a different relationship with the Federal Government than are the cities in relationship to their states.

Q But with regard to the policy considerations that you referred to, the same policy considerations are applicable?

A That is right.

Q To state regulation?

A [220] That is right.

Q Do you think that the state regulations, hours, and working conditions of municipal employees were unnecessary?

A I don't know exactly how to answer that. I think that they were undesirable. I think that in most jurisdictions you will find that even the most – even the jurisdictions that generally have the most advanced working conditions are ones that are way ahead of the state legislation, and the state legislation tends to only deal with a small number of stragglers and it doesn't really involve an awful lot – the majority of either the units or the majority of the people that are affected.

Q So the states have felt it necessary to deal with stragglers?

A It has come largely as a political matter, not as a – it is seldom ever dealt with, and I have been through many of these struggles in the state legislatures. It is very seldom if ever dealt with from the standpoint of social concern; that is, are people working too many hours? It is simply a matter of political pressure that is put on the legislatures and they act because they feel they must.

Q [221] So your testimony is that the states are adopting these regulations with regard to the municipalities because of political considerations rather than because of need?

A I think that is generally the case at the state level.

Q I would like to come back to the complaint and I would like to ask you with regard to paragraph 44, page 20.

It says "Allowing for overlap between these groups and calculating the average increase from the data gathered, the minimum impact for the first year on fire personnel budget nationwide is estimated at a minimum of $200 million."

Do you know how that figure was arrived at?

A It was arrived at based upon the data compiled in here –

(Indicating.)

– from the reports that were put together in this report.

Q The report doesn't contain the figure; is that correct?

A No.

As I indicated, the data – we helped with the survey instrument. ICMA collected – used the instrument [222] to produce this report.

We then sat down with Bill Danielson and with Mike Mitchell, Battalion Chief from Los Angeles, and Bill Danielson from Sacramento and a special task force composed of some representatives of local government and some other experts in this field and – which worked with us all the way through the public hearings on the regulations, and looked at all of this data and made the projections that are contained in here.

And they are, I think as reliable an estimate as anybody is able to make because they are based on a much broader array of data than anybody else in the country has available.

Q Is it possible for you to go through those calculations and the projections?

A Here?

Q Well, here, if you can.

A I didn't go through the calculations myself.

Q Did you check them over?

A My staff went through the calculations.

Q Did you check them over?

A Well, within reason, yes. I know basically they [223] explained to me what they did.

Q Is there a document that exists that contains those calculations?

A I would have to look and see.

Q I will ask Mr. Rhyne –

MR. DODELL: Could you provide us with this?

MR. CHARLES RHYNE: If there is one, I will give it to you, yes.

MR. DODELL: You don't have anything here?

MR. CHARLES RHYNE: No, I don't. If I did, I would give it to you.

I think, as a matter of fact, since you mentioned it, I checked myself through here, and I find that our Exhibit 4-A which you already have – I want to be sure the things referred to in the complaint – and Exhibit 4-C, 6-A, 6-B, and 6-C are probably things we did not give to you but that were marked.

I am not sure.

MR. DODELL: The regulations, of course –

MR. CHARLES RHYNE: Those are the regulations themselves.

(Indicating.)

[224] These are these Commerce Department studies, you see.

This one is '73, see. They are more data on employment of public employees. That is about the size of it, and the regulations.

MR. DODELL: The regulations we obviously would be familiar with. This other data I am not familiar with at this time.

Are these spares?

MR. CHARLES RHYNE: Yes. You may have them.

MR. DODELL: Thank you very much.

MR. CHARLES RHYNE: They are data that was used in working on the complaint. I think the paragraphs are marked as in the other instances where they are referred to, you see.

MR. DODELL: I don't think we should mark them as exhibits here at this point. I haven't referred to them yet, and I don't know that I will.

I do appreciate your saying that you will undertake if there is some –

MR. CHARLES RHYNE: I will. We will ask the staff.

MR. DODELL: If there isn't a writing, then I [225] wonder if you would undertake to explain how this was arrived at?

MR. CHARLES RHYNE: We can ask the staff how they arrived at it, sure. I understood he was not to bring with him his experts, just bring himself. I so instructed him.

MR. DODELL: We did not ask for the experts.

MR. CHARLES RHYNE: I know you didn't. That is why they are not here.

BY MR. DODELL:

Q This goes back to Defendant's Deposition Exhibit

37. I would like to call your attention to the summary of findings that is on page 1.

MR. CHARLES RHYNE: You say Exhibit 37?

MR. DODELL: This is our Exhibit 37. We will have to get you a copy of this.

MR. CHARLES RHYNE: All right.

BY MR. DODELL:

Q I would like to call your attention to the passage – Why don't I read it into the record?

"The nationwide survey of state and local governments excluding education and hospital institutions indicates that wage levels for state and local government employees not [226] covered by the FLSA are on the average substantially higher than those of workers already covered. Hence, if coverage under the FLSA is extended to these workers, comparable minimum wage and overtime standards would not have as great an impact as did the earlier extension of FLSA coverage to employees of state and local governments, schools, hospitals, and residential care establishments."

You can look at that, Mr. Pritchard. I wonder if you agree with that or disagree with that.

A I think I would agree in part. I think I would agree in the first part of it, in the sense that this is what the *Congressional Record* said and it is what we said, that there was no need for the legislation in terms of the minimum wage; that the wages at the local level generally are in line with community wage levels, and there are very few instances where there is any situation where public agencies fall below the minimum wage.

Now the part I would question – and I again can't document here, but I think this is a matter of just

sensible interpretation – one would have to question what this means when it says that it would not have as great an impact as did earlier extension of FLSA – FLSA wage covered [227] employees at state and government schools.

If it means in total – if it means they were underpaid and were brought up, I would suppose that that is true. If it means in terms of total fiscal impact and other related impacts, then I doubt that that is true.

You see, I would point out, for example, that one of the things that is not recognized is that in local government service the majority – well, I won't say the majority – the biggest block of employees in city government are in the police and fire service. There is historically a parity situation between police and fire.

Now if you have a situation in a city and this is – this is by far the general case, where the firemen – let's say – let's say they are working 60 hours, and the policemen are working 44 hours. Therefore, the policemen comply – let's say the firemen are working 64 hours. They are not complying with the law now. The policemen are working 44, so they are in compliance.

You, by law, reduce the hours of the firemen. You immediately destroy the parities that existed between the uniform services. You immediately then have to do something for the policemen. When you have then done something for the [228] policemen and the firemen, you have destroyed the ratio between the biggest single block of employees and all the rest of the employees in city government and you immediately have to restructure the whole wage system.

That is the way local salaries and wages are keyed.

They tend to be keyed to the police and fire services; so that when you are talking about this, the fact that the policeman and fireman may not be affected by the minimum wage, the fact that you affect the firemen's overtime or the hours that they work – that is what I mean, not the overtime, but the hours they work – and you end up having to reduce the hours, you have a significant ripple effect that changes the salary relationships and salary structure for all of the municipal employment. It just sets off a chain effect. It happens every time.

In the State of Ohio, for example, the firemen in the City of Cleveland, by a referendum initiated in Cleveland, and adopted by a public vote, says that the salaries for the firemen in the City of Cleveland have to exceed by a given percentage the salaries paid to the highest paid firemen in any other jurisdiction in the state; no discretion by the city at all – by the city governing body. Whenever [229] any community, whether it is Worthington, Oakwood, Cherry Hills, or some little community, or Cincinnati, raises their firemen's salaries, the City of Cleveland has to raise their salaries so it exceeds that limit by a certain percent. As soon as that happens, all the rest of the salaries in the city have to be adjusted.

So by that particular act, they not only fixed the firemen's salaries, but the salaries of everybody in the city.

So when you say it will not have a significant effect as it did in this other, I would challenge that as a statement depending upon what interpretation is put on that.

Q Do you have any documentation on that other than

the observations you just made?

A I would point out my basis for that observation, and that was if you look at my résumé you find from 1961 to 1962 I was staff director for the municipal commission which was a half million dollars Ford Foundation study of the staffing of city governments and municipal power. It is the most comprehensive study that has ever been made of how cities run their personnel systems in this country. It is based upon a very extensive analysis of some 600 field [230] interviews of that situation, and I think I speak with some knowledge of how the system works.

Q How does that bear on the question of whether the 1966 amendments or the 1974 amendments had a greater impact on –

A I –

Q Excuse me. May I finish?

– on state and local governments?

A I am saying this phrase can be interpreted two different ways. If it is saying that the impact of the '66 amendments was great because it raised low-paid school and hospital employees up to the minimum wage, I think it is probably correct. If it is saying that the total dollar impact of the new legislation will not be as great as that, I doubt that that is true. I am saying that this is not a case of just bringing people up to the minimum wage, which did not have the impact of setting off a whole set of chain reactions.

The new legislation will set off a whole set of chain reactions because that is the way the system works.

Q It is correct, is it not, that in terms of changing the number of hours worked, 15 percent of the cities have

[231] firemen working more than 60 hours and the other 85 percent do not have firemen working more than 60 hours?

A We are on the first stage; we are in the first stage. We are on our way, under this legislation, to go down to 42 or 40 hours, not 56 or 50.

Q [232] Then would you say it is true as to the first stage, that the statement that I have shown you is true as to the first stage?

A I don't know what the magnitude of the impact of the '66 amendment was. I haven't see the dollar numbers. I suppose it is in here. If I examined this, I suppose I could determine it. I don't know that we felt in looking at this and looking at the principle of it that comparing it to what happened in '66 was a significant concern.

Q So then, you are really not equipped to comment, if you don't know the –

A You asked me if this statement was correct. I said part of it I would agree with, the other part I think is questionable.

Q What I am asking you is if you don't have the figures as to the '66 amendment, then it is really difficult to make the comparison, is it not?

A That is why I raised – I said I raised the question. I have a question on the basis of my general knowledge as to whether that last part was accurate. I don't have the figures to prove it, one way or the other.

Q Now, I see in my notes, coming back to paragraph [233] 44, the last sentence, I have the same question that I had as to the 200 million figure. This sentence reads, "Increased costs for other essential state and city governmental functions are reasonably certain to amount to billions of dollars per year, due to the impact of these 1974 amendments to the Act."

I take it you are not prepared at this time to go through the calculations to indicate where that billions of dollars per year comes from?

A No.

Q Again, I would ask if there is any documentation that shows that calculation, I would ask that it be provided to me.

If there is no such documentation, whether a letter could be written or some kind of written explanation as to how that figure was arrived at.

(Discussion off the record.)

MR. DODELL: If you will indulge me a moment, I would like to consult with my co-counsel.

(Recess.)

MR. DODELL: I am delighted to say that we are going to give you back an hour and three-quarters. I think [234] we have asked everything that we had in mind.

MR. CHARLES RHYNE: The only thing I am going to do is have his biographical data marked.

CROSS-EXAMINATION

BY MR. CHARLES RHYNE:

Q Is that what you furnished as your background data?

A That is right. Yes.

MR. CHARLES RHYNE: I will have that marked as Plaintiff's Exhibit 1.

(The document referred to was marked Plaintiff's Exhibit No. 1 for identification.)

MR. DODELL: I think that is fine. Could we go off the record for a moment?

(Discussion off the record.)

(Whereupon, at 5:15 p.m., the taking of the deposition of Allen Pritchard was adjourned.)

[Certificate omitted in printing]

Transcript of Deposition of Charles A. Byrley, December 24, 1974

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

NATIONAL LEAGUE OF CITIES, et al.,	)	
Plaintiffs,	)	
vs.	)	Civil Action No. 74-1812
HONORABLE PETER J. BRENNAN, Secretary of Labor,	)	
Defendant.	)	

DEPOSITION OF CHARLES A. BYRLEY

Washington, D. C.
Tuesday, 24 December 1974

Deposition of CHARLES A. BYRLEY, called for examination by agreement of counsel, at Room 4121, Labor Department, 14th and Constitution Avenue, N. W., Washington, D. C.; at 9:55 a.m. before Dennis A. Dinkel, a notary public in and for the District of Columbia, when were present on behalf of the respective parties:

CHARLES S. RHYNE, WILLIAM RHYNE, and RICHARD BACIGALUPO, Esqs.; on behalf of Plaintiffs.

NATHAN DODELL, Esq.; Assistant United States Attorney; on behalf of Defendant.

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PROCEEDINGS

[3] MR. CHARLES RHYNE: With respect to the part of the court order allowing the Plaintiff to take depositions of Defendant's witnesses, we have decided that if defendant will give us a statement of the basis of the $27 million estimated increase in cost set forth in the preamble to the regulations as published on December 20, 1974, for police and fire, and will state in there the facts on which that $27 million estimate or whatever it is based, and whether it is applicable to both states and cities or just cities, we will not take the deposition of Defendant's witness on that subject on the 26th.

By on that subject, I mean on the basis of cost.

Secondly, if Defendant will give us a letter stating why we cannot see the thousands of letters of protests that were described at a recent White House meeting and why we cannot take Mr. Faulk's deposition – Mr. Faulk being the one who presided at that meeting, with respect to these letters – and we understand that the basis is confidentiality or executive privilege – we will not take Mr. Faulk's deposition on the 27th.

That completes my statement about those [4] depositions, and I would like to have those letters served on us at the same time as your brief.

MR. DODELL: Mr. Rhyne, these are matters that we will obviously have to consider and I will have to discuss it with my clients as well as with my office. We will give you an answer as promptly as we can.

I would just say for the record that we have been trying to work out the question of what depositions you wanted to take, and we have been discussing these

matters since Thursday, and I appreciate your reducing what you need to these two items.

I think you will concede it is true that this is the first time you have made this proposal in these terms, and I can't give you an instantaneous reaction.

What I will endeavor to do is let you know as early in the day on Thursday what our reaction will be to these two questions. I would say today – but it is Christmas Eve and I don't know who we will be able to reach today.

I think you indicated yesterday that you were having trouble reaching people at your own office yesterday afternoon.

[5] If that is agreeable, then that would be fine.

I would like to say just for the record that I wasn't present at the White House meeting that you were fortunate enough to be present at. I wasn't in the case yet at that time.

I understand that your recollection is that there was a reference to thousands of letters. I spoke to somebody who was at the meeting who doesn't recall that there was a reference to thousands. I don't think we have to really get into a dispute about that. That is just for the record.

I thought I should make that point.

I very much appreciate the effort and accommodation that you have made and your courtesy in that regard.

Is it agreeable to you that we get an answer to you as early as possible on Thursday?

MR. CHARLES RHYNE: Yes.

MR. DODELL: The answer would be sure, we will supply this at the same time we file our brief, or if we can't, we will work out some other arrangement.

MR. CHARLES RHYNE: Fine.

With respect to this morning while Mr. Byrley [6] is out of the room, I should tell you – and I think it will expedite his examination, we would like to give to you now the letters that he has from governors, that relate to the impact of this Fair Labor Standards Amendments on states.

I believe he has nine – a set of nine letters, one from the Governor of Wyoming, one from the Governor of Maryland, one from the Executive Assistant to the Governor of Missouri, one from the Governor of Arkansas, one from the Governor of Florida, one from the Governor of Iowa, and one from the Governor of Vermont; one from the Governor of the State of Washington, and one from the Governor of the State of Utah.

These are letters, as I have said, that Mr. Byrley has with him with respect to impact of the Fair Labor Standards Act Amendments of 1974 on states.

In addition to that, we have already given you – you have marked as Exhibit 12, the letter that has reference to paragraph 50 of the complaint from the Assistant Attorney General of Arizona, that reporting the facts with respect to Arizona.

MR. DODELL: I want to thank you for these [7] letters, Mr. Rhyne, but merely for the record, these are matters that are not specifically referred to in the complaint. Is that correct?

MR. CHARLES RHYNE: That is true. I say we give them to you because – well, I will just have to let Mr. Byrley explain them. I will tell you, he gave them to me as representative of the states and the effect of the Act on them.

You can see they are all rather late dated, in the last few days, and we are just trying to give you all the information that we have with respect to impact.

MR. DODELL: Thank you. As I said I merely wanted to refer to the fact that these are not referred to in the complaint.

MR. CHARLES RHYNE: That is true.

MR. DODELL: Off the record.

(Discussion off the record.)

MR. DODELL: Can we go on the record for a moment?

Mr. Rhyne, yesterday at the deposition I think that your associate, Mr. Bill Rhyne, indicated you had all the exhibits except 37, nonsupervisory employees in state [8] and local governments submitted to the Congress in 1971. We have a copy. I am pleased to be able to give it to you.

MR. CHARLES RHYNE: Thank you very much.

(Discussion off the record.)

Whereupon,

CHARLES A. BYRLEY

was called as a witness, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DODELL:

Q Mr. Byrley, for the record, could you state your full name and address?

A Charles A. Byrley. My home address is 9205 Christopher Street in Fairfax. My office address is 1150 17th Street, N. W., Washington, D. C.

Q Mr. Byrley, Mr. Rhyne was kind enough to give us a biographical sketch. Why don't we have this marked

Defendant's Exhibit 38 for identification.

(The document referred to was marked Defendant's Exhibit No. 38 for identification.)

[9] MR. DODELL: Off the record for one moment.

(Discussion off the record.)

BY MR. DODELL:

Q Mr. Byrley, I take it that Defendant's Exhibit 38, your biographical sketch, reflects your professional experience and your education; is that correct?

A That is correct. It is done quite briefly, as I am sure you have observed. I assume that is adequate. Any questions you may have, I would be happy to respond to them.

Q I would ask you, Mr. Byrley, to refer to paragraph 50 of the complaint.

A Yes.

Q I would ask you also to refer to Defendant's Exhibit 12.

A All right.

Q Now, is the entire basis for paragraph 50 of the complaint found in Defendant's Exhibit 12?

A Yes.

Q Now, reading paragraph 50, the estimate of cost is for fiscal year 1975 to 1976?

A Yes, sir.

Q [10] Do you know whether that is a fiscal year that begins July 1, 1975?

A Yes, sir because Arizona is on a July to June fiscal year. Yes, sir.

Q That being the case, am I correct in saying that there is no specific dollar figure for the alleged cost that the Fair Labor Standards Act Amendments will have for

Arizona in the fiscal year ending June 30, 1975?

A No. As stated by the Plaintiff, I think they are speaking of the $2.5 million, actually for the one year. The projection actually is not made, as I read this.

Q The projection is not made for the year ending June 30, 1974; is that correct?

A That is my understanding of the statement, yes.

Q Now, looking at paragraph 50, there is a reference to a $1.5 million increase in the cost of providing state police services. When you examine Exhibit 12, do you find a reference to increase in the cost of providing state police services in Exhibit 12?

A Not on my cursory reading, no, sir.

Q Mr. Byrley, do you recall what the source is of the information regarding state police services?

A [11] I would assume that – first of all, if I am not mistaken – and I think I am correct in this, there perhaps have been more than one conversation. I know of at least one conversation I guess from the Assistant Attorney General or the Attorney General himself, in Arizona, to counsel.

I know there has been a call to my own office. I therefore make the assumption that the statement is made in the complaint itself. That it is taken from a prior conversation, perhaps with Mr. Rhyne himself.

Q Do you recall any conversation in which that –

A I have not personally talked with the Attorney General or the Assistant.

MR. CHARLES RHYNE: I don't want to interfere with your examination, but I think I should state again on the record that copies of this complaint were sent to every city or state named here, and they confirmed the

accuracy of the facts.

This was an oral counsel-to-counsel statement, and sometimes they suggested additional facts, orally.

Some of those conversations were with me and some were with my associates.

[12] MR. DODELL: I am reluctant to burden the record with this, but I feel I have an obligation to simply refer to the fact that the verification does state that it is on Mr. Byrley's knowledge.

I understand by inadvertence, this may not be something that is on his own knowledge, but I would point out the verification does so state.

MR. CHARLES RHYNE: Well, I would only add that I was talking to him constantly, others were, so I believe that these facts were brought to his attention by counsel, which is a usual way of bringing such facts to the attention of people under these circumstances.

I think he was justified in saying he knew these facts one way or the other, either from letters or from conversation.

Thank you.

THE WITNESS: I can supplement this by saying that I do know for a fact that my office, a specific individual has tracked this from the beginning, that he has talked with Arizona officials and can attest to this, the fact that he has verified the data, if that clarified the question.

[13] BY MR. DODELL:

A Mr. Byrley, do you know how many hours per week Arizona state police averaged in the fiscal year 1974-'75?

A No, sir. I suppose on any similar question in that regard, I would also give a negative response to. All I can attest to is I have every confidence in the people in

Arizona, public officials who put together this material.

There is no question whatsoever in my mind. I accepted it as being accurate.

I do not have the personal knowledge as to how many hours were given in given circumstances by police, or by fire, or any other specific question I suppose that you might put to me in that vein.

Q So, you don't know how specifically the state of Arizona and its Attorney General's office calculated this $1.5 million increase?

A No, sir, I do not. I have no reason to question that this is a budgetary process they go through as would be the case with the other 49 states. It is a very elongated process.

It is not unlike that of the Federal Government. [14] In fact, that budget process, I suppose, begins on July 1st, just as you are counting up either your surplus or your deficit as the case may be, as the fiscal year ends.

It is a continuing process.

Q Do you know of your own knowledge whether Arizona in coming to this conclusion took into account the exemption under the Act for executive administrative and professional employees?

A No, sir. I do not. Not unless it is stated here. I just don't recall. I have, as you might imagine, just in preparation for this deposition have inundated myself in reading. I personally am not the expert in this area, as I would assume the person interrogated yesterday – would have been the case.

The Governors' Conference as you know is, in terms of actually entering the litigation as it were, was a late entry. My own position as previously indicated, is that of

executive director. I cover the whole range of issues that are of concern to governors. This is obviously a very important one, but I have not immersed myself in the kind of detail, I think, that might well be desired for a record.

Q [15] And, Mr. Byrley, looking at paragraph 50, there is a reference to a $200,000 increase in the cost of providing health services. Is that found – look at Defendant's Exhibit 12, do you find a reference to that in the – in Defendant's Exhibit 12?

A Again, I would answer in the negative but I would probably, I think, provide the same response as I did previously with the total awareness of – I know of several telephone calls. How many precisely, obviously, I don't know – between my office and officials in Arizona. I am confident – even this letter states at least one telephone.

I am confident there must have been others by counsel with the officials of Arizona, with the answer to your specific question being no.

Q Do you have any idea how many hours per week were worked by people in the health services – state health services in Arizona?

A No, sir.

Q [16] Do you know how many hours per week are worked in highway construction on the average in Arizona?

A No, sir, but the – if I might – and I don't know -- this is subject to your own wishes, I think I should point out that Mr. Rhyne – if Mr. Rhyne hasn't already, perhaps in my absence, just in the last 2, 3, 4 days I have received several communications, some at my own

solicitation or that of my office, and others which just came in naturally that tend to cover the kinds of data that you are now asking me about; but as you would look at those pieces of paper from the several states – and many more are coming – let me say – I could no more answer, you know, a specific question such as you have placed: how many hours for highway construction, or how many hours in social services, or what have you, for those states.

And I would be most happy to make those of record if that is proper, and if you want them.

I think some are perhaps more complete, some perhaps less complete than that which was provided by the single state plaintiff as of this point in time.

I could add, perhaps gratuitously, that although it is paragraph 50, and Arizona we are talking about at this [17] point in time, I have been reasonably assured by my own personal counsel inside the office that at least firm commitments have been passed along to the counsel for 4 additional states; and he expresses a confidence that this number will grow considerably in the very near future to become parties to the suit.

It is not viewed as being prudent, nor do I, to attempt to identify until the action obviously takes place.

My point is simply to say that you will find, I suspect, in the preliminary correspondence that is provided, as was the case with Arizona, the same kinds of very generalized data.

I personally can't support, except again to say that I have no reason, because I work with these people day in and day out and in a generalized sense. I am not the Arizona Highway Commissioner. At one time I could tell

you how many hours in Kentucky, because I was the Deputy Commissioner of Highways, as you may have observed. I don't hold that position now.

Q So I think it follows from what you have said that other than the – what is said in the letter, you don't know how Arizona calculated the $2 million – $2-1/2 million [18] figure that is specified in paragraph 50?

A No, sir.

Q Do you happen to know what the total payroll is of the State of Arizona?

A I think I have records here that would show it. I do not know it off the top of my head. If it's permissible, I will make a search in a few minutes to see – if it's important.

Q Would it be readily available? if not, we can look for it later.

A Well, I guess I don't know. I think probably it is found in – perhaps Bill or Rick might wish to start searching. I think it may be found in this here (indicating).

MR. CHARLES RHYNE: You are referring to public employment –

THE WITNESS: You are talking about the total personnel budget or the total budget?

BY MR. DODELL:

Q I was asking about the total personnel budget.

A Okay.

Q We can move on while they are looking.

A I think it is possibly in that.

[19] MR. CHARLES RHYNE: I think, Mr. Dodell – I don't have my copies because I gave them to you yesterday, those Department of Commerce –

THE WITNESS: This happens to be – there are two or three. This is public employment in '73, the last year for which data is available, at least in this form.

I have the Arizona budget, for example, in my office. I just don't carry those –

MR. CHARLES RHYNE: I gave this – Mr. Byrley, I gave that to Mr. Dodell yesterday. He has it.

BY MR. DODELL:

Q Now, with regard to paragraph 44 of the complaint, at page 20, down about 2/3 of the way in the paragraph there is a sentence that reads, "Allowing for overlap between these groups and calculating the average increase from the data gathered, the minimum impact for the first year on fire personnel budgets nationwide is estimated at a minimum of $200 million."

Now do you know how that $200 million figure was arrived at?

A I believe – back in the context – that this is the study done by the International City Management Association [20] and by the gentleman in California, Danielson.

I recall taking a very close look at that overall study at the time that it was first made available to me. I was quite impressed with it and with his work and his seeming knowledge of the whole field.

Again, to answer your very specific question, do I know how precisely he arrived at $200 million? No, sir.

Q Well, is it your understanding that that $200 million figure was in the study, in the ICMA study?

A Again the study I think is of record here. I don't know personally whether the figure is in there or not.

MR. DODELL: For the record, my recollection of the

testimony yesterday is that the figure is not in the study.

MR. CHARLES RHYNE: And we said we would get the way it was arrived at and give it to you. We will say the same thing with respect to Mr. Byrley here. We will get it for you.

MR. DODELL: All right. The same would be applicable, I take it, to the last sentence of that paragraph which refers to increased costs for other essential state and city governmental functions are reasonably certain to amount to billions of dollars per year due to the impact of these 1974 amendments [21] to the Act?

I take it the same is applicable, that you are not familiar with the way in which that was figured out?

THE WITNESS: I think perhaps this may be a difference or distinction without a difference. I think I am better prepared to address myself to that, because first of all, this is a more generalized figure, when one speaks of billions.

I am personally convinced, in reading the entirety of the brief that has been placed before you, and as I talk with state people generally, or as my shop does and they report to me, as I see the letters that I had reference to earlier, which I would be happy to make available to you if it is proper – and when I get that general view of figures that are being projected, and having only heard from perhaps maybe 10, 12 states, I am not quite certain what the number is, as a matter of fact – yes, I feel quite confident that that's an accurate statement, that it's going to be in the billions, as it were.

BY MR. DODELL:

Q Could you state how that figure specifically is arrived at?

A [22] As I have said previously, not unlike Arizona, I do not how Florida arrived at whatever it did; I don't know how California – which is – I was told would be telecopied to me today. I am sure it will be a large figure.

The specific methodology, the specific means by which one could even for that matter determine is beyond comprehension; and that is so in my judgment because of things like that (indicating).

Q When you point –

A This specifically (indicating).

I don't know how anyone could project anything based on what it has today from the Department of Labor.

MR. CHARLES RHYNE: You are referring to the Code of Federal Regulations, part 29, parts 500 to 1899?

THE WITNESS: Yes, sir.

BY MR. DODELL:

Q Did you ever sit down with a pencil and paper and do calculations that led to a figure of billions of dollars?

A No, I have people that have. Well, I can answer that in the affirmative, as a matter of fact. That goes back to days when I held other positions, as you may have noticed in my résumé, which I think is not relevant to your question.

[23] I have not sat down personally with that, no. I have people in my shop who do it every day.

I carry Title 19, the infamous Medicare program, that was found to be such a great program, it would cost a fairly infinitesimal sum; it was very nominal, a great program.

The State of New York alone spent every dollar that was available in the first year of the program. The

program was designed for 50 states.

Q Did you ever review the figures by which this billions of dollars was arrived at?

A You speak of these billions here? (Indicating)

Q Yes. The specific – just so the record is clear –

A I think so. I don't know how better to answer the question.

Q Excuse me.

Just so the record is clear, I am referring specifically to the sentence, "Increased costs for other essential state and city governmental functions are reasonably certain to amount to billions of dollars per year due to the impact of these 1974 amendments to the Act."

The specific question I am asking you is: have you [24] ever seen a sheet of paper that indicated sources of increased cost that had dollar amounts for each increased cost and a total figure of a certain number of billions of dollars?

A May I ask you, sir, is that again in the context of the '74 amendments? Or is that in the general context?

Q I think it was a very specific question.

Could you read it back, please?

(Whereupon, the Reporter read from the record as requested.)

THE WITNESS: May I interpret the question in the total context, as you put it?

The answer to the question is no.

MR. CHARLES RHYNE: While we are on the subject of payrolls, we have located in what we had marked as Exhibit 6-A on public employment 1973, the total payroll of Arizona for 1973. That's the only information we have. This is one of the documents I gave you late

yesterday.

MR. DODELL: As I read this, I gather the figure then is for the state government of Arizona, $23,241,000; is that correct? State government only?

THE WITNESS: That's my interpretation of the table.

[25] MR. DODELL: Thank you very much, Mr. Rhyne, for providing us that.

MR. CHARLES RHYNE: Would you want to mark that so you know what we are talking about?

MR. DODELL: I think you have identified it. If you want to make that an exhibit – I don't see the need for it at this point. Either of us can refer to it in briefs.

MR. CHARLES RHYNE: Yes, we can ask that judicial notice be taken of it.

MR. DODELL: Mr. Rhyne, before we came – we started questioning Mr. Byrley, you asked us for the basis of the $27 million figure that appeared in the regulations?

MR. CHARLES RHYNE: That's right.

MR. DODELL: What I would call the interpretive bulletin.

The facts on which it is based, whether it applies to states and cities or just cities – and I said I would see whether we can furnish that and let you know on Thursday morning whether we could supply it. and if we can't supply it we will file it at the same time as your brief.

Yesterday and today we asked questions about the $200 million figure and the billions of dollars figure that [26] appear in paragraph 44. I would ask if you can provide the same type of information that you have asked us for with regard to the $200 million figure and

the billions of dollars figure, namely the facts on which they are based.

MR. CHARLES RHYNE: I stated yesterday I would furnish you the information with respect to the $200 million figure; and I assume we can furnish what facts we have with respect to this generalized statement at the end of the paragraph 44. But as I say, we are operating under the same problem you are mentioning earlier.

Everybody seems to be gone over the Christmas holidays. We will get it to you as quickly as we can.

MR. DODELL: Thank you very much, Mr. Rhyne. My recollection is that yesterday I made the request with regard to both figures.

MR. CHARLES RHYNE: We will do the best we can.

THE WITNESS: I wonder if I might make an observation in that regard?

MR. CHARLES RHYNE: Usually you wait for questions, but I am sure if you want to make one, go ahead.

MR. DODELL: Within reason and if it relates to what we have been talking about.

[27] THE WITNESS: It's a redundancy in part, I guess, on my part; and that is the certainty of understanding the state budgetary process, which in my judgment is far superior, and I think most people would agree, to that to which our federal friends are accustomed.

Again, it's a continuous process. These things just don't happen. Arizona's didn't just pick out of the air somewhere figures and say they happen to be – whatever they happen to be. Nor did they do it or are they doing it in California, or New York, or any state in the nation.

It just so happens that I believe this to be true: I think the 49 governors – I think every governor except the Governor of Kentucky, will appear fairly shortly now, in the next – within a month, before his legislature and will present a total state budget either for a full fiscal period beginning next July 1, or for a biennium, whichever may be the case.

I have worked, as I have indicated, shown, extensively for quite a period of time in state government. I feel I know it fairly well. We are not talking about people who don't know their business. We are talking about very sophisticated budget people, very sophisticated analysts that [28] work with whatever they have to work with, albeit sometimes not so good, as a matter of fact.

If they haven't presented or prepared to present either to their governor or their governor-elect by now some fairly sophisticated figures of the impact of the '74 amendments, I somehow have for pity for them. I think that's important.

BY MR. DODELL:

Q The fact remains that with regard to Arizona, you don't know how they –

A I personally do not know. I indicated that previously.

Q [29] Mr. Byrley, Mr. Rhyne was kind enough to provide us with the letters that you have referred to from nine states.

Can we have these marked, please, with the next numbers?

I will keep them in the same order you had them in. Wyoming will be 39; Maryland, 40; Missouri, 41; Arkansas, 42; Florida, 43; Iowa, 44; Vermont, 45;

Washington, 46; and Utah, 47.

(The documents referred to were marked Defendant's Exhibits 39 thru 47 for identification.)

MR. DODELL: I take it, Mr. Rhyne, that we can stipulate these letters which you have given me today relate to matters not specifically addressed in the complaint; is that correct?

MR. CHARLES RHYNE: Yes. I would say except the overall impact.

BY MR. DODELL:

Q Addressing ourselves first to Defendant's Exhibit 39, as I read this, the state of Wyoming, through [30] its governor, has written to you by letter of December 20, 1974, that the unanticipated cost of extended – expanded overtime pay coverage will equal $2,415,103 for the period May 1st, 1974, through the fiscal biennium, 1975 through '77.

This letter was dated December 20. Were the facts in this letter known to you at the time you verified the complaint, Mr. Byrley?

A No, sir. That would be true, I am quite confident –

Q I am sorry. I didn't hear the end of the answer.

A Well, the answer is no. This letter was not.

Q The facts in the letter were not known to you?

A No, sir.

Q And I take it from your prior answers that you don't know how Wyoming calculated the figure of $2,415,103?

A No, sir.

Again an observation: When I see, 2,415,103, it shows again a high sophistication and not just a figure out of the air.

Q [31] You mean the fact that it isn't a round number shows that it is – shows sophistication in preparing the figure?

A I think so, yes, sir.

Q Turning to Defendant's Exhibit 40, which is a letter from Marvin Mandel, the governor of Maryland, to you, and this states in part, "I have been informed by the Maryland Department of Personnel that overtime regulations governing Maryland's state employees substantially conform with the provisions of the Fair Labor Standards Act relating to overtime compensation."

So far as you know, this is accurate, I take it?

A By the same token, any other statement in this letter or the others I have answered in the affirmative, yes.

Q And again I take it that you don't know how Maryland calculated the last sentence of that paragraph which says it is our judgment that full compliance with the overtime provisions of the Fair Labor Standards Act will require – will result in an additional annual expenditure of approximately $2.25 million?

A No. I do not know how that was calculated.

Q Again this letter dated December 20, 1974, were [32] the facts in that letter known to you at the time you verified the complaint?

A No.

Q Now turning to your letter – excuse me, turning to the letter of Perry A. Roberts, executive assistant of the state of Missouri, which is Defendant's Exhibit 41, October 28, 1974, this states in the first sentence that it is a reply to a special letter regarding the proposed Department of Labor rule concerning salary levels to be

used for mimimum wage exemptions. Was that a general letter sent to all governors, the letter that's referred to?

A I am inclined to think so. If I remember correctly – and I cannot attest to this – if I remember correctly, there was a letter to all governors out of my office, either under my signature or not, that talked about the salary means test, or whatever that was.

Q Was there any kind of a general letter that went out of your office to all the governors that asked them to report back the impact that the Fair Labor Standards Amendments would have?

A Not to my knowledge. I think, as I have previously indicated, the – most of these letters, I assume, [33] that carry dates of December 20 or thereabouts – this one does not, it does refer to a specific letter that presumably, and I believe came from my office.

But to my knowledge, and to my recollection, there was not a blanket inquiry or request made of my office to all governors to at this point in time measure impact, no, sir.

Q Mr. Rhyne, would it be possible for us to get a copy of that special letter that this letter is a reply to?

MR. CHARLES RHYNE: I am certain it will. I will undertake to get it and give it to you.

MR. DODELL: Thank you very much.

THE WITNESS: If it exists. I have not said it does. I make an assumption.

MR. CHARLES RHYNE: We will look.

BY MR. DODELL:

Q Do you know whether these letters that seem to cluster around December 20 resulted from a specific effort to get information from the states around that

time?

A Well, very definitely. This is a very concerted effort. I can't suggest any particular rationale for a selection of states. My guess is maybe as many as 20 states, [34] 25 states may have been contacted. I am confident it was by telephone; and I am equally confident that probably it was for one person, which accounts for the way it clusters, to use your term, around certain issues.

Q You think perhaps as many as 20 or 25 states were contacted?

A That would be my idea. It is a sure guess.

Q Do you know whether any states declined to furnish any of such information in response –

A I have no knowledge of any declinations. It has never been mentioned to me.

Q Do you know whether any states indicated that there was a negative – no impact?

A I have no such information and no one ever suggested that, no, sir.

Q But in any event, if 20 or 25 were contacted, it appears that only some nine have responded at least to date; is that correct?

A I haven't seen today's mail. We speak of holiday seasons and other things. I am confident that a very high percentage of those contacted will on a fairly timely basis get us some data.

[35] When I speak of timely basis, I keep in mind that tomorrow is Christmas Day, and a week later is New Year's Day. It will take longer, given that time of year, than otherwise would be the case.

Q I think you may have alluded to this. Do you know how the 20 or 25 states that you referred to were

selected?

A I think it was just random – as random in all probability as one could imagine. I am confident as can be there was no rationale whatsoever. It is who you know or who answered the phone the fastest or who you think would respond the fastest.

I think that perhaps was the way it was done.

Q Mr. Byrley, this act was adopted on April 8th, 1974. How do you account for the fact that a concerted effort to obtain this kind of information didn't occur until, as I understand it, late December 1974?

A How come there was not a concerted effort on my part? Or at least the part of the organization?

Quite frankly, I must confess – and I do this quite reluctantly – I don't think the National Governors Conference – and I accept full responsibility for it – [36] really tracked the legislation as well as it should have. I think that answers clearly as far as the organization is concerned. We don't like to admit to those things. Occasionally we err.

Q You were aware of the act's passage, I presume?

A I am aware of the act. I am aware of amendments almost every year, it seems. I am sure that's not true. I would point out, totally parenthetically – and my counsel may stop me, I don't know – but my being in this town as executive director of the National Governors Conference is due in large part, in my opinion, because of failure for someone to have tracked the amendments of 1966.

It looms very large in my mind, because I can hear all kinds of governors just raising all kinds of Cain, if you will, both for the substance, I suppose, of the

amendments, as a point in time, but perhaps equally important – I just don't really know – equally important, possibly of not knowing. That's a problem we live with even now.

Q Mr. Bryley, in the case of the 1966 amendments, are you aware that 27 states participated in litigation [37] to try to set aside? Are you aware of that? In a court case?

MR. CHARLES RHYNE: Mr. Byrley is not a lawyer.

MR. DODELL: He still may be aware of the fact.

THE WITNESS: I guess I would ask the question – answer the question by answering one; is that Maryland versus Wirtz?

MR. DODELL: Yes.

THE WITNESS: I guess that makes me a lawyer now. I have heard of it. I don't know its findings.

BY MR. DODELL:

Q Do you know a lot of states participated in that litigation?

A I was not aware of that. I really was not.

Q Turning to Defendant's – I am sorry. Excuse me. We are on Defendant's Exhibit 41. I went off to another area.

I am really not sure I understand what is being said here by Mr. Roberts in this letter. Is it your reading he is attributing this 1.5 million –

MR. CHARLES RHYNE: 3.1 million.

MR. DODELL: I will come to that.

[38] BY MR. DODELL:

Q The 1.5 million, that deals with executive, administrative and professional categories who he finds not to be within the exemption? Is that your

understanding of this?

I am not sure I understand what is being said here.

A I make that assumption, but I can't state it to be a fact. I, too, am slightly confused. I think it would probably require going back again to the letter that exists or doesn't. That might give a clue to that.

Q And referring to the 1.5 million and the 3.1 million, which Mr. Rhyne alluded to, again you don't know the detail of how these figures were arrived at?

A No. You would have to know the first figure to know definitely the second one, it seems to me.

Q And this letter was dated October 28. Was this a letter known to you at the time that you verified your complaint?

A No, sir.

Q Now, turning to Defendant's Exhibit No. 42, which is from the state of Arkansas – and this is addressed [39] to you – as I read this letter – and am I correct? – it appears to deal exclusively with executive, administrative and professional employees; is that correct?

MR. CHARLES RHYNE: You are referring to the first paragraph where he says, "United States Department of Labor proposed wage rate changes for executive, administrative, and professional employees would impose a tremendous financial burden on the state of Arkansas. . ." and then he goes ahead and says, "many employees now exempt would be subject to overtime."

MR. DODELL: The next sentence talks about these employees – we can both pause to read the letter. My quick reading is it appears to relate only to executive, administrative, and professional employees.

MR. CHARLES RHYNE: Well, I don't quite read it

that way. I guess it speaks for itself.

THE WITNESS: I guess I can't either gain that particular interpretation.

BY MR. DODELL:

Q I am sorry?

A I said I guess I can't gain that interpretation either, at least not to the same degree that you apparently [40] can.

Q Well, as Mr. –

A Again an observation, if I may, the – one, the – I am sure this is probably true in many, many offices, the fact that I am shown as the addressee doesn't necessarily mean that I would have been the actual recipient of the letter. That certainly was the case in this instance.

So I guess the answer to one of your next questions is no, I was unaware of this letter at the time the complaint was verified.

What I wanted – the observation, though, was that it seems to me – and I could be totally in error – it seems to me that the secretary wrote to selected individuals, all governors, maybe a larger audience somewhere in this time. Something tells me – and again I would have to verify this, and perhaps I can't, but something tells me this responds to a communication from the Department of Labor in some way, not addressed to them, but telling me what they told the Department of Labor.

I can't relate – I guess what I am trying to get at, I can't relate to this in the context of myself or [41] even my shop, for that matter, having sought this kind of data at that point in time.

Q Unless it relates, I would presume, to the other special letter?

A The subject matter doesn't seem to mesh. We will see.

Q All right. I guess we will have to look for that other letter.

MR. CHARLES RHYNE: I think the regulations that came out on the 20th of December refer to the fact that the Secretary of Labor did write to the governors about those regulations.

THE WITNESS: There may be a linkage there.

BY MR. DODELL:

Q What I was referring to was an earlier letter that said this is in response to your special letter. That one dealt with these professional, administrative employees.

MR. CHARLES RHYNE: We will see.

BY MR. DODELL:

Q This Arkansas letter, am I not correct, makes no specific reference to any dollar amount?

A [42] That's correct.

Q Now turning to Defendant's Deposition Exhibit No. 43, the first sentence of the third paragraph puzzles me because it speaks of money for hospitals and mental institutions, the first – why don't we say that whole paragraph?

I am sorry. Let me withdraw that observation.

MR. DODELL: Would you indulge me a moment?

(Discussion off the record.)

MR. DODELL: This may be backing and filling. I do want to ask a question about the third paragraph.

BY MR. DODELL:

Q It is correct, is it not, that the 1966 amendments related to hospitals and expanded coverage of the Fair Labor Standards Act to state hospitals?

Given that fact, can you – do you understand what the significance of that paragraph is to the 1974 amendments?

A I am not at all certain that I can. In fact, just before leaving the office this morning to come here, I raised essentially the same question with a person in our shop who has not been our key professional to work [43] the issue that is dealt with in there.

I personally again am not that familiar even with what happened in '66. I do know that it made the distinction as between educational institutions and what we regard as general, other employees. I don't know whether there are any classes or categories within that. I am not that familiar with the '66 amendments.

I would admit to personally having been slightly confused, because I don't really understand what is being said. I had problems with the figures as a result of that.

Q And –

A May I add to that comment – and this, to me, again is what is so incomprehensible as I look at everything that I can see, at least, in context:

That is that a sovereign state, the state of Florida, a state that has made some tremendous strides, in my judgment, in recent years, I think, in upgrading its whole administrative capacity and what-have-you can – I guess any way you read this, if it be a mistake – how it could make such a mistake.

Again I guess I have to refer back to a communication, information systems. How do people know if a [44] state legislature – this is what is being said here – appropriated 500,000, irrespective, I think, of our interpretation here, they had to – this had to be done, it seems to me, in

what I would call gross error; and that usually stems, invariably stems just from bad information. I don't understand.

I guess we go back to working from the book that is built for industry or somebody.

MR. CHARLES RHYNE: You are talking about Exhibit 6(a) again?

THE WITNESS: Yes, sir.

MR. CHARLES RHYNE: Part 29.

THE WITNESS: It is a very confusing – very confusing to state officialdom. I am sure it must be the case of local officialdom; and it extends obviously beyond the Fair Labor Standards Act of 1974.

It is my view that the department – at least in this instance here, it would appear to be quite apparent, is not doing a sufficiently effective job to cause them to understand if in fact they have made an error. I don't know that they have.

With no intent on my part to filibuster, I think [45] maybe the next paragraph is more important than any other part of the letter.

Again not being able to personally account for how they estimated the cost of $800,000 annually, if record keeping costs do amount to those kinds of figures, and they have means for having determined that, I think we are in for one big, big problem.

BY MR. DODELL:

Q Well, is it your understanding that the record keeping is – that it results with regard to states, is more onerous than with regard to other businesses that have been covered by the act since 1937?

A I would have no idea. I could not possibly respond

to the question.

Q And other businesses, including small businesses, have been required to comply with record keeping provisions since 1937; that's correct, isn't it?

MR. CHARLES RHYNE: He wouldn't know that; he's not a lawyer.

MR. DODELL: He might know.

THE WITNESS: Well, I don't know it, unfortunately.

[46] BY MR. DODELL:

Q Do you know whether states are required to keep records with regard to the 1966 amendments that extended coverage to hospitals and educational institutions?

A I do not know. The answer is no, I do not know.

Q Well, let me –

A May I comment further on the question?

Perhaps I do know and don't realize it. I am again reminded of 1967 when I opened the office for the governors conference which was referenced earlier in discussion among the governors at that point in time, venting considerable frustration on their part.

I recall – I guess two basic complaints. One was a dollar impact, and secondly, and seemingly to me, as I recall it, almost equally important, was what they called something like a double standard of dealing with employees and of record keeping.

If I heard correctly, then I guess they are responsible for that administration, that record keeping. I recall very distinctly a discussion of double standards in dealing with the general employee situation.

Q What do you mean by double standard?

A [47] The act dealt – of course, again I don't know

the specifics of it, but partly based on – I guess most of what you said, and partly what was in one of these letters, I don't recall which exhibit – that it dealt with hospital employees, either all – I just don't know, but hospital employees, and with, I guess, educational institutions. These are state employees. I think that's true invariably in every state.

The only question I have here at all is in certain educational institutions, particularly in what I call the big ten – I am not quite certain about the state university relationship – but that exception aside, if in fact it is one, does present a problem, it seems to me, if you are having to function somehow for one kind of employee differently than you do another kind of employee.

This was the – and again this is a recollection going back to 1967. Keep that in mind. It was programmed such as that in the whole raft of what then was known as the Great Society programs, one a day, as they were saying, and venting that kind of frustration again was what prompted their saying, well, A means – I don't know what B means, but A means keeping abreast of some of the Washington [48] developments, having a resource of our own.

Thus again the establishment of the governors conference.

Q I am not sure I understood one aspect of what you said. You mean the governors were concerned that some employees were covered by the Fair Labor Standards Act, and some were not?

A They were going through the same process as we appear to be now. There was total confusion is what I am trying to indicate. I don't know even the resolution of it,

much less the – they were trying to understand – and I will use some of their language – you can imagine some of it, there was total frustration.

We were talking about the whole raft of legislation, not the Department of Labor, although I suspect it had its share of it, I don't know.

Again to use the parlance of some of the governors, a program a day. There was absolutely no information, no means of even knowing what it is that now has been adopted by the federal government, much less intelligent guidelines or approaches to implementation; and what I am saying, it was the interpretation of some that there were [49] double standards.

There were difficulties in knowing even what to do, much less how to do it. The ultimate result, I don't know.

Q Are you saying there was similar confusion in 1966 that you are saying exists now?

A Yes, I am saying that. To a much lesser degree, in my opinion.

Q To a much lesser degree?

MR. CHARLES RHYNE: Now or then?

THE WITNESS: A much lesser degree then than now.

BY MR. DODELL:

Q You did say you thought there was great confusion then?

A Yes.

Q And the governors were all referring to it at the governors conference?

A No. Several governors.

Q Several governors were referring to it?

A Talking about that and – pick a figure, 10,000

others, if you will.

I mean what I am trying to describe for you is [50] total frustration on their parts; and I don't know whether it is 50, or 40, or what.

In fact, there was even a special meeting in December of 1966 to talk about the Fair Labor Standards Amendments of 1966; that's where two governors are talking. I am talking about the whole raft, again, if you will, of legislation that had occurred in a period of two, three, four years, a vast barrage of it.

I think perhaps we can both agree to it, that there was – which has nothing to do with the merits or the value of that legislation or those programs.

Q In 1966, several governors were complaining about the confusion that was caused by the Fair Labor Standards Act Amendments of 1966; is that correct? You were aware of that?

A Yes, that is true.

Q And yet in the case of the 1974 amendments, you said that it wasn't until relatively recently that you started to get this information about impact?

A I said we have done a poorer job. We tracked it. This is professional competence. As I have indicated previously, I feel that we didn't do as good a job as I [51] would like to have done.

Q Did you receive expressions of concern from governors between April and October or November of this year about the Fair Labor Standards Act Amendments of 1974?

MR. CHARLES RHYNE: Could we take a brief break?

(Recess.)

[52] THE WITNESS: To answer your question, I

simply can't imagine that I haven't, and yet I must confess that I can't recall a conversation with the governors.

BY MR. DODELL:

Q Okay.

A I can't conceive of it, again because of the magnitude in which we deal. There are just a few things that occur that at least a governor, if not several don't raise with me, what does it mean, what would I do about it.

Q In the nature of your position, Mr. Byrley, if there had been substantial expressions of concern by the governors about these amendments after April 8th, I assume because of the responsibility of your position, they would have made some impact upon you, is that a fair statement?

A Well, I don't know. Let me – one thing you have not asked me, and I think wasn't necessary at all, one thing among many I am sure – is the Governors' Conference itself and its structure and what have you. I don't know whether it is important, or relevant.

One point is, I think, in the context of your question: That is that the Governors' Conference [53] reorganized following a full year's study which was culminated by adopting revised articles of organization last March, last March 7th, as a matter of fact, at which time my own position changed.

That is when I was selected to become actually the first executive director of the organization. In that period of reorganization – and in fact it is continuing – which accounts in some part, in some measure for what I might suggest is something less than I would desire in tracking

and monitoring and reporting on several activities including the Fair Labor Standards Amendments of 1974.

I now have in place – I am very pleased to note – a director of state-federal relations; he has a unit that works specifically with the Hill on the one hand, he has a number of special assistants that work directly with him on problematic issues.

I think that possibly can give you a better feel for why I can't answer quite as directly as you might imagine certain questions that you have placed, because my concern is an overall concern.

I worry about state services. I have run a school, if you will accept the term, for the newly elected [54] governors, a two and a half day seminar for them, not to acquaint them with the Governors' Conference, but to acquaint them as best I can, and my staff, and others – well, I say others, and experts from around the country, including former governors, including academia, what have you, to advise them as to what – say, so now you are governors, so now what are you going to do?

That is a considerable digression, except to point out the dimensions of my total responsibility. The key point is in a period which happens to run somewhat parallel to the period of time we are talking about here, we have undergone considerable changes as an organization.

BY MR. DODELL:

Q My concern is this: that according to your testimony in 1966, the governors were very concerned about the impact that the Fair Labor Standards Act Amendments of 1966 had?

A Yes. They were concerned about the lack of

knowledge and still were, even as of that point in time. That is the point that I was trying to establish. I stated it differently than I would want to state it, as I just now stated it.

[55] It wasn't an ultimatum. Even today I don't know what the result was. I am saying they were concerned about programs a good bit of which is hearsay. I don't mean the bill itself. You can read that and interpret it any way you wish to. I am talking about, specifically about the Department of Labor in this instance.

Certain governors not feeling that they really had a full complete understanding of what those amendments did, what they were, how they might be implemented, et cetera.

That's what I think I have reference to.

Q Did you say that your recollection of 1966 was that there were governors who were concerned about record keeping and about double standards in the specific Fair Labor Standards Act area?

A Right.

Q And I think you said several governors expressed concern in 1966 or 1967?

A I think several governors – I don't know what is "several," first of all. If I make a statement in this room or a larger one, a larger setting, where I express some venom, if you will, almost in a much larger context [56] now of a whole raft of federal programs that I can't even learn about, and I use the Fair Labor Standards Amendment of that year as an example, and perhaps there were many others.

My point was, it just came to my mind – and it sort of stuck as it were, and the point is quite singular. It was to

illustrate confusion on their part. Confusion which I insist continues today.

We are now in 1974. The point in my mind is quite minor.

Q In 1966 governors were concerned about the Fair Labor Standards Amendments sufficiently, so that eight years later you remember the expressions of concern that they expressed?

That is true, is it not?

A Yes. And I am confident that if I were seated with Casper Weinberger and either – having a deposition taken, or just in conversation, I am confident I could come up with several programs that might pertain to him or his predecessors as it were.

Q Then along comes a Fair Labor Standards Amendments of 1974 which had some – are you aware it had some [57] fairly substantial legislative history? I think there was an enactment, a veto, and a subsequent legislation?

Are you familiar with that history?

A The last recollection that I have, vis-à-vis the amendments of '74 at about the point in time of the conference reorganization that I referenced earlier, were statements, quite general in my own shop, of people expressing complete confidence that those amendments would be vetoed by the President.

I think I distinctly recall – and I may be in error about this – but I distinctly recall either from staff or reading the newspapers or what have you, recommendations to that effect of both – well, the Secretary of Labor – I lose track of time here, as to – maybe that is a factor or it isn't.

I am not saying it is. I am simply recalling that to be a fact.

Q But then –

A My point is my positions changed. That is not to say that I shouldn't have kept that in mind. Again, that is – if I should have, that is my problem.

My point is that the conference reorganized. My [58] job, if you will, changed only in the sense that it is an overall responsibility with a much broader mandate than it ever had before, and I have personally devoted – and I think quite properly, almost an inordinate amount of time to a mission that I think has been under attended for too long perhaps.

That is doing such things as I mentioned earlier, and the only reason for having mentioned it, and that is the seminar for governors elect. I think that is important.

I take a lot of my time to visit with governors individually, to learn – and here I learn, you know, of all kinds of problems. My own focus has been – because the answer more often than not is – it obviously goes back to the question.

My concern is state capacity. It reflects my own background I suppose, in part.

Q Mr. Byrley, my focus isn't on you and what you did. My focus is on the governors' reorganization on April 8th. I assume that governors or their staffs pay some attention to matters that may have some significant impact upon their states.

Now, in your verified complaint, the allegations [59] are made that increased costs for state and city governments are going to increase billions of dollars as a result of the 1974 amendments; and my question to you

is: Would it not seem reasonable to expect that if this were to be the impact, that governors would have immediately contacted your organization or made their views known to you shortly after April 8, 19 –

A And I have not suggested that they have not done so.

Q Excuse me.

A I answered, if I recall correctly, that I couldn't imagine that not having occurred, words to that effect. I think it is quite important again that one understands a switching of hats or what have you.

Now, what I mean by that is there may be two, three – I don't know – people in my shop whose state must not be – not quite different, but yes, I recall governors – whom every – yes, we talked about this when I was out in "X" state.

All I can answer is what I know, and I am saying my own attention has not been in that regard. I first became very much back in force, if you will, in a total state-federal [60] spectrum, if you will, and particularly here when the executive committee of the Governors' Conference took the action that it did vis-à-vis this lawsuit.

Q When was that?

A It was November 16th, if that is a Thursday. I don't have a calendar.

MR. CHARLES RHYNE: I should tell you the letter that was delivered to me is another one of the letters. This is from Governor Reagan of California.

I will give you a copy of that, Mr. Dodell.

MR. DODELL: Thank you.

MR. CHARLES RHYNE: It is a letter dated December 23rd.

MR. DODELL: May we mark this –

MR. CHARLES RHYNE: He says it will cost him $16 million.

MR. DODELL: This is Exhibit 48.

(The document referred to was marked Defendant's Exhibit No. 48 for identification.)

THE WITNESS: That meeting was November 14th.

BY MR. DODELL:

Q [61] As Executive Director of the National Governors' Conference since March 1974, would other members of the staff bring major matters that might pertain to the National Governors' Conference to your attention? Would that be the customary practice?

A I would hope so. Again, I have to give an answer that I hope you will view as adequate. It is true.

What happened in March of 1974 with the reorganization was, as I indicated, a tremendously, in my view, new and increasing mandate.

That same action – they increased their dues level by exactly 90 percent, which is something we never heard of in days like this, which I think again shows their new commitment to getting a job done, which is neither here nor there.

My problem, however, is that that dues increase was not voted to become effective until July 1st of next year, 1975.

Now, sir, I think you begin to see my problem, that I am still trying to cover the world, as it were, the whole new mandate. I have spent quite a bit of time in trying to do that, with in effect and in fact fewer [62] staff than I had on entry to this reorganization.

MR. CHARLES RHYNE: Could we have a short recess?

MR. DODELL: Sure.

(Recess.)

BY MR. DODELL:

Q We were last on Exhibit 43, and at the bottom of the letter, in handwriting – and I guess it is signed by you, it says Mr. Anderson called as promised. Figure is $5,560,773.03. And I presume that you don't know specifically how this figure was reached?

A No, sir, and the call was not made to me. It was made to an assistant.

Q And if you will forgive my being facetious, in light of a previous answer, is it your view that the fact that it says three cents lends sophistication to the figure that is given here?

A Well –

Q You don't have to answer that if you don't want to.

MR. CHARLES RHYNE: I will so stipulate.

BY MR. DODELL:

Q [63] Turning to Exhibit 44, which is from Iowa, here again the letter refers to additional state expenditures of from $3 million to $3.5 million annually; and you don't know specifically how these figures were arrived at, I presume; is that correct?

A No. I think that whole paragraph is important.

I am sorry.

A It reads, "Our budget analyst in the Office of the State Controller advised me that –" blah, blah, blah; my point being the budgetary process, which is why it is only now that these figures are coming into play.

Q You don't know what effect if any the budget

analyst gave to the exemptions for professional, executive, and administrative employees?

A No, sir.

Q Looking at – is this the Governor, Mr. Salmon?

A Yes, sir.

Q Looking at Governor Salmon's letter, one thing that strikes me is that this letter is somewhat more detailed than some of the others and at the same time the total figure is $825,000, which appears smaller than some of the others.

MR. CHARLES RHYNE: The small state of Vermont.

[64] BY MR. DODELL:

Q I suppose Vermont is a small state, but then again perhaps some of the others were also small states.

Do you draw any inference from the fact that Vermont is more detailed and perhaps comes up with a small figure?

A He is a member of the Executive Committee that made the decision to enter the lawsuit. He is better informed personally, in my judgment. He is well informed, let me say.

Q Having read these letters, would you make a judgment that these figures seem smaller comparatively or relatively than some of the other figures that we have seen?

A I just don't recall the other figures. I suppose we will see some larger and smaller.

Q Now, for example, this letter seems to state administrative cost is $35,000, whereas Florida, I believe, stated them as $800,000. You said that Governor Salmon is well informed and a member of the Executive Committee. Do you think his are more realistic than the

Florida figures?

A No. I would not make that assertion.

Q Now one of the points that is taked about here, is compensatory time as resulting in incresed costs.

Here I would like to ask you a general question, [65] Mr. Byrley: is it your opinion tha the Act would irreparably injure states because of te effect on what you call compensatory time?

MR. CHARLES RHYNE: If you lok at page 2, in the first full paragraph, it talks about conpensatory time. I assume that's what you have reference o, Mr. Dodell?

MR. DODELL: I did mean to refer o that. I did try to ask a more general question as to thegeneral allegations in the complaint regarding compensatoy time.

THE WITNESS: Well, compensatorytime alone, is that your question?

BY MR. DODELL:

Q In paragraph 27– and what I antrying to do is ask the more general question based onthe fact that this particular letter from Vermont refers to compensatory time. Paragraph 27 talks about compenatory time.

MR. CHARLES RHYNE: And he is referring to paragraph 27 of the complaint on pagel3.

THE WITNESS: I would want tohear the question again.

BY MR. DODELL:

Q Isn't it one of the claims of the governors' [66] conference that the fact that the Act eliminates what you call compensatory time, inflicts ireparable financial injury on the states?

A Yes, it is one.

Q It is one of your contentions?

A Yes, sir.

Q Now, I will say in passing that we explored this at some length yesterday; and I have an example that I think will indicate the question that I have.

I think it's easiest to treat the issue in terms of a hypothetical case, if I may.

Let's say there is an employee whose normal work week is 40 hours and he makes $2 an hour; and under the Act in a normal week he would earn $80. If he works 48 hours in a week, he would receive the $80 plus $16 for the 8 hours overtime plus $8 for the time and a half, which would mean he would receive $104.

I have this written down. I will let you look at it afterwards.

Now, under the Act's provisions, as I understand them – and you can correct me if any of the premises of my question is wrong – at a later week, let's say 6 months later, [67] 4 months later, 2 months later, the employer could cause the employee to work 28 hours and not work 14 hours and pay the employee 56 hours.

The result would be that the employee would earn $104 for the overtime period and $56 for the short week which would result in a total cost of $160, or 2 weeks at the regular rate.

Now, if that is correct, then I would like you to explain, if you would, how the elimination of compensatory time results in an additional cost to the states, assuming that the employees were to receive compensatory time at the rate of 1-1/2 hours for each hour worked?

A We are going to be here longer than I thought we were.

MR. CHARLES RHYNE: Do you understand what he is saying at all?

THE WITNESS: I really don't.

MR. CHARLES RHYNE: If you don't understand it, don't try to answer the question. We went through a lot of hypothetical things yesterday and I don't think we got very far with them.

I would strongly recommend you not answer [68] hypothetical questions that you don't understand. Just stick right with the facts.

MR. DODELL: For the record, if you have no objection, I would mark my sheet of paper the next exhibit number.

MR. CHARLES RHYNE: You go ahead and mark it.

(The document referred to was marked Defendant's Deposition Exhibit No. 49, for identification.)

BY MR. DODELL:

Q Can you explain then why the elimination of compensatory time results in increased expense to the states?

A I thought perhaps incorrectly that someone in these letters did a fair job of doing that.

MR. CHARLES RHYNE: He was asking you about Exhibit 45 on Vermont. There is a discussion of compensatory time. I don't know whether that's the one you have reference to.

Is that it?

THE WITNESS: I suppose one might wonder why – about the hypotheses, and just look at that. Is the governor in error?

BY MR. DODELL:

Q [69] Well, what we are trying to understand is why

permitting an employee to work or requiring an employee to work a shorter week at a later time cannot legally accomplish the same result as giving compensatory time while at the same time comply with the Act and not cost the state any additional expense.

A Well, I think one is a subterfuge; and I think, two, employees have rights here just as they do under the basics of the Fair Labor Standards Act. It makes no sense to me.

Q The question I am asking, Mr. Byrley, is why would the method I have suggested result in any additional cost to the state?

A I don't think the question is appropriate or relevant. I think what is important is what Vermont thinks and what it wants to do.

Q Well, can you explain why the method I have suggested would not eliminate any increased costs to Vermont that is referred to on page 2 of the letter?

MR. CHARLES RHYNE: I think he has testified that he couldn't understand the method that you were suggesting; and that all he could talk about were these facts that the [70] governor of Vermont gave him. That was my understanding of his answer.

THE WITNESS: That is my answer.

BY MR. DODELL:

Q And you simply do not understand the question that I asked?

A No, I really don't. Moreover, as I have already said – at the expense of being chided by counsel for saying too much – I think that's for Vermont to decide; and it isn't just a question of dollars.

Q No, but all I am talking about at the moment, Mr.

Byrley, is the question of dollars; and what I am trying to ask you is why it costs the state a greater number of dollars to pay time and a half for overtime and require the employee to work a shorter work week later on than it does to give the employee compensatory time off and pay him the same salary in the two weeks?

A I don't accept your caveat. Again, this goes back to your example which I don't understand.

Q When you say –

A I stand on what the governor of Vermont said.

Q When you said you don't accept my caveat, what do [71] you mean by that?

A Your illustration.

Q Well, when you say you don't accept my illustration, do you mean that it's impossible –

A I don't understand it, quite frankly, and I have said so. I think certain assumptions perhaps are being made that we don't – I don't know what – that what you have suggested in fact can be done, much more whether one would wish that it be done.

Q Mr. Byrley having been related to state government matters for at least – well, I can't total it up, but it's well over 16 years, it may be 25 years –

A That's my total life.

Q Your whole work life?

A Right.

Q Is it impossible for you to conceive that a state could have somebody work 48 hours in one week, and then 28 hours in a subsequent week; is that an impossible situation to conceive of?

A I view it with extreme adversity. I think it would be viewed with extreme adversity by a lot of employers and

employees.

Q [72] Isn't that what compensatory time results in?

A No. Not in my opinion.

Q Doesn't compensatory time result in the man working 48 hours one week and 28 or 32 or whatever the number of hours in a subsequent week?

A It could on a given occasion.

Q Isn't that what it involves?

A No, sir; not at all.

Q What else could it involve?

A You are assuming a given class of employees, I think, at a given level which I think is not necessarily valid.

Q I don't understand what you mean. What assumptions are necessary – well, let's strike that.

MR. CHARLES RHYNE: It just seems to me, Mr. Dodell, that what he is saying is he can understand what the governor of Vermont has said, and he thinks the governor of Vermont has correctly reported the facts; and so I think that the various assumptions and hypothetical questions that you have put have probably been at least to me and to him a little more confusing than clarifying.

He does certify that he thinks these facts that [73] the governor has reported are accurate. Isn't that what we are looking for here rather than a hypothetical situation? We are looking at actual facts that the governor reports as compared to hypothetical facts which are difficult to understand.

MR. DODELL: I would rather not debate with you, Mr. Rhyne. I would rather try to pursue it a moment.

MR. CHARLES RHYNE: All right.

BY MR. DODELL:

Q I asked you, isn't the situation where an employee is given compensatory time that he works, for example, 48 hours in one week and then 28 or 32 hours or whatever figure in a subsequent week?

MR. CHARLES RHYNE: He answered that question under certain circumstances. He answered that. So you don't need to ask the same one again. The record will show he answered it.

MR. DODELL: All right. If I may have forgotten the answer, is that your answer, yes, under certain circumstances?

THE WITNESS: Yes.

BY MR. DODELL:

Q [74] All right.

Now, do you acknowledge that in some instances compensatory time is provided at the rate of 1-1/2 hours for each hour overtime worked?

A I am sorry. Do I acknowledge that state governments presently – is that –

Q Do you acknowledge that in some circumstances, state governments provide compensatory time at the rate of 1-1/2 hours compensatory time for each hour of overtime worked?

A I guess I am dated in my experience here. I think they do, but I can't testify to that as a fact.

Q But you think they do sometimes, at least, or some states, at least in some circumstances, provide 1-1/2 hours compensatory time?

A That's my supposition.

Q For one hour overtime?

A That's my supposition, yes, sir.

Q If that's the case, would it not be true that if a man made a salary of $2 an hour, and he worked 48 hours one week, then at a later week he could take – would work 28 hours or he might work 28 hours and receive $80 for the first week, and $80 for the other week, for a total payment of $160?

A [75] Counsel, you didn't tell me to bring my computer.

MR. CHARLES RHYNE: Well, I certainly can't compute it. I am trying to urge that he stick with the facts rather than all this supposition business.

Maybe we could move on.

MR. DODELL: All right.

BY MR. DODELL:

Q [76] Mr. Byrley, could you explain the statement in paragraph 27 of the complaint which deals with compensatory time? That says – and this is about – it starts nine lines down.

"It avoids the meaning and wasteful make-work projects during slow periods. It allows the employer to most efficiently deal with many areas of government which involve peak employment problems."

Could you explain that?

A I think I can at least in part. There are, I guess, so-called down periods of time. If it suits the employee to take compensatory time rather than to engage in meaningful work, then that would seem to make sense.

I think that's what is being said here if I interpret it correctly.

Q All right.

Why can't the same results that are spoken about in those two sentences be achieved by paying overtime at

peak periods and giving time off without pay at subsequent periods?

A I think these kinds of things are always negotiable with the employee, so I will give you the [77] same answer as was said earlier. Under certain circumstances, I think that would be entirely feasible; under others, it probably would not be.

Q Now referring back again to Exhibit 45, do you know what the average hours of the Department of Highway employees of Vermont has been since May 1, 1974?

A No, sir, I do not.

Q Now do you know any of the details about the lawsuit that is referred to at the second full paragraph on page 2?

A That's the suits against the state?

Q The suit against the state.

A No, sir, I do not.

Q Do you know whether the state is making any contentions in that suit that are similar to the claims in this action?

A I have no knowledge whatsoever of that except as this letter from the governor points out.

Q Now turning to the letter that is Defendant's Exhibit 46 – and this is a letter from Governor Evans of Washington – and it is dated November 15, 1974. Did you know about this letter when you verified the complaint?

A [78] No, sir. And this is in the category again with some others we talked about. It must be responding to a communication from the Labor Department.

Q This is a letter to the Labor Department, as a matter

of fact?

A Yes.

Q And this letter, as I read it, refers solely to volunteer firemen; is that correct?

A I believe that's correct.

Q And – I have nothing further on Exhibit 46.

I take that back. As I read Exhibit 46, there is no dollar figure in Exhibit 46; is that correct, as to an estimated cost?

A That's correct.

Q Now with regard to Exhibit 47, which is the letter from Utah, other than what's stated in the itemization that is in the attachment to the letter, you have no specific information as to how those figures were arrived at; is that correct?

A That's correct.

Q And I take it you don't know what the average work week of the Highway Patrol is?

A [79] No, sir.

Q Now this letter from Governor Reagan dated December 23, am I correct that there is no details stated in the letter to support the figure of $16 million that is stated in the letter?

A I guess I don't have that.

MR. CHARLES RHYNE: This is the one that just arrived.

THE WITNESS: Yes.

MR. CHARLES RHYNE: One-day mail service. It probably came on a telecopy machine.

THE WITNESS: No, there is no supportive figure.

BY MR. DODELL:

Q Thank you.

Now, Mr. Byrley, there are states that have statutory

provisions that deal with wages and hours of pay of cities and other governmental subdivisions; is that correct?

A That's correct.

Q Do these provisions inflict irreparable injury on the cities or on the other subdivisions of the state?

A I think I personally am not aware of any such [80] allegation.

Q Why don't they inflict injury, irreparable injury upon the cities or other subdivisions?

A I must assume they are equitable. They are subdivisions, of course, of the state.

Q So equitable –

A Even if there were inequities, I guess, would be my point. I don't suggest that there are.

Q So equitable regulation of hours and wages of city and other subdivisions of states, employees, don't inflict irreparable injury upon those subdivisions as long as they are equitable?

A I did not answer that way.

MR. CHARLES RHYNE: You are trying to draw a distinction between the federal government and the states now?

MR. DODELL: I am trying to ask questions and elicit answers.

MR. CHARLES RHYNE: I see what you are doing. I just want him to understand it.

THE WITNESS: I see it, too. I didn't answer the earlier question.

[81] BY MR. DODELL:

Q I don't want to misstate what you said.

A I said, number one, I was unaware of any such allegation. I spoke of equity and I spoke further it

wouldn't make any difference, anyway, because there are subdivisions of the state quite different than the relationship of the state to the federal government.

Q Is it your opinion that having had your whole working life in state government, that state provisions that regulate hours and wages of employees of cities and other governmental subdivisions inflict irreparable injury upon those cities and other subdivisions?

A No, sir.

Q It is your opinion they do not?

A That's correct.

Q And the reason for that is because they are equitable; is that what you have said?

A I did not say that. I am not aware of any allegation of any inequity, I said.

MR. CHARLES RHYNE: He also said that after all, a state can do what it wants to do with its own political subdivisions. They are part of the state. You [82] don't have a question of equity, really.

BY MR. DODELL:

Q Mr. Byrley, you are saying it doesn't matter if –

A I would say –

Q Let me just try to finish it.

You are saying it doesn't matter if the state regulation would inflict irreparable injury upon the state or the subdivisions, because the state or the subdivision is subordinate to the state?

A I am saying we do not have the Constitutional issue that is obvious and inherent and implicit in the question.

Q Well, Mr. Byrley, you can explain your answer, but it seems to me that you can try to answer the question. I think you already said it –

A I think it is hypothetical, as I have indicated.

MR. CHARLES RHYNE: He has answered it two or three times, really, the best anybody could answer such a question.

MR. DODELL: Thank you, Mr. Rhyne.

[83] BY MR. DODELL:

Q Now, why were those statutes thought necessary?

MR. CHARLES RHYNE: Now you are covering, Mr. Dodell, an enormous area of state law; and to have him explain why every enactment of a state relating to state personnel is necessary is a long, long story. Really I don't see that it is relevant to this lawsuit. He's not a lawyer; but if you insist upon an answer, I will let him answer the best he can.

MR. DODELL: Well, Mr. Rhyne, just to respond, I could have given an answer that would be shorter than your observation. It may not be accurate.

Could I suggest what it would be? Mr. Byrley can agree or disagree.

MR. CHARLES RHYNE: Okay.

MR. DODELL: Because the cities were not providing adequate wages or working conditions.

BY MR. DODELL:

Q Do you agree with that, Mr. Byrley?

A I don't agree or disagree. I am not qualified to answer the question. I understand the question. I am simply saying I am not qualified to answer it.

Q [84] You mean with 23 years, or your whole working life in state government, you can't express an opinion on that question why were these statutes deemed necessary?

MR. CHARLES RHYNE: Every one of them has a

different background, Mr. Dodell.

THE WITNESS: You find some with a Constitutional base, some with a statutory base. I worked with the legislature; and a given legislator, because of his feeling – not the body, his feeling of inequity, would seek, you know, to provoke Constitutional change, statutory change.

I don't feel qualified to give you the kind of answer that would satisfy you.

BY MR. DODELL:

Q Now we could find the page reference if we have to, in Mr. Pritchard's deposition, but Mr. Pritchard said that – and I am paraphrasing what he said, because I don't have the passage in front of me, that those statutes were merely politically motivated and without need.

Do you agree with that?

MR. CHARLES RHYNE: Each one of them was different.

THE WITNESS: Again I don't feel I can respond intelligently any more so than to the last question.

[85] BY MR. DODELL:

Q You can't answer that question?

A No, sir.

Q Just for the record, let me ask it again so we know what question you can't answer:

Were those statutes merely politically motivated and without need?

MR. CHARLES RHYNE: He says he can't answer it.

MR. DODELL: Fine.

BY MR. DODELL:

Q Do the wages that a state pays it employees and the terms upon which it pays its employees for overtime have

any impact on its tax rate?

A It is extremely doubtful in my judgmen.

MR. CHARLES RHYNE: That's where i gets all its money.

MR. DODELL: Was that on or off the record, Mr. Rhyne?

MR. RHYNE: It can be on the record.

THE WITNESS: Would you repeat the question?

MR. CHARLES RHYNE: I am not sure he understood the question.

[86] BY MR. DODELL:

Q Do the wages that a state pays to its employees and the way in which it handles payment of overtime compensation to employees have an impact on the state tax rate?

A I see very distinctly a cause-effect relationship, and I think that's what it is.

Q In other words, if the wages are higher and if there's greater compensation for overtime, then the tax rate might go up?

A If other considerations brought about the tax increase. I think it works both ways.

Q [87] Now, do some states seek to attract new industry and new residents and for example, retirees?

MR. CHARLES RHYNE: You are speaking of the state itself as distinquished from groups within the state? You are talking about state government, for example?

MR. DODELL: Yes.

MR. CHARLES RHYNE: As distinguished from individuals promoting retiree developments and things like that?

MR. DODELL: State governments.

THE WITNESS: I think the state government per se, essentially no. If it were even partially yes, it is the most indirect – it would come in the most indirect form.

BY MR. DODELL:

Q Haven't you ever seen advertisements from the state of "X" or "Y" to consider relocating in that state?

A I might have seen one. I don't – again, I take your question as a very broad and generally attributable to states. I don't know of any one state that ever failed to do anything.

It is part of the system, as it were. My answer would stand as I gave it. I don't view this as any essential functions or one that is carried out for that matter, [88] except in such a negligible degree that it sounds inconsequential.

Q But you have seen advertisements from states that do attempt to attract industry? Was that part of your answer?

A I can answer that I can very clearly vividly recollect one state advertising for industry.

Q Which state was that?

A Mississippi.

Q Now, are tax rates one element that is relevant to the choice that may be made by an industry or an individual to locate in a particular state?

A Not in my opinion.

MR. CHARLES RHYNE: Let's shorten up these answers. Let's let it go at that. Just let it go. I think on these advertisements you are going to find the chamber of commerce pays for it but they have the governors' picture on it.

MR. DODELL: That is not testimony.

MR. CHARLES RHYNE: Well, I lived in this field all my life, I know what goes on.

MR. DODELL: That may be , Mr. Rhyne, but that [89] is not testimony and the court can't take judicial notice.

If you want to document it, I would be pleased to receive the documentation.

MR. CHARLES RHYNE: No.

BY MR. DODELL

Q Why would a state –

A With that exchange, I would like to add a footnote, I don't know who paid for the ad from Mississippi.

Q Why would a state that pays its employees relatively high wages and premium overtime pay be interested in defending the authority of another state to pay relatively lower wages and not to pay premium overtime pay?

MR. CHARLES RHYNE: That is a very "iffy" speculative kind of a question.

Do you understand that? It just doesn't seem to me that any state would be doing what you are suggesting, Mr. Dodell.

MR. DODELL: Well, I don't understand that, Mr. Rhyne. The complaint alleges that the Governors' Conference is filing this suit on behalf of all of its members, which are 50 states. So, it seems to me that according to the allegations of the complaint, there are states that are [90] doing that, if that allegation is correct.

MR. CHARLES RHYNE: There is no allegation in there that the states that pay high wages are defending states who pay low ones and all that kind of thing.

MR. DODELL: I think that is the effect of the lawsuit, Mr. Rhyne.

MR. CHARLES RHYNE: This is your interpretation.

MR. DODELL: That is why I think it is relevant.

MR. CHARLES RHYNE: Well, I don't, but if he thinks he wants to comment, go ahead.

THE WITNESS: No comment.

BY MR. DODELL:

Q You mean you can't answer it? Just so the record is clear, we are going to have a transcript of this. I would like the record to be clear. You just don't choose to answer?

A It is not a matter of choice. I can't conceive of – it makes no sense to me, the question doesn't.

Q The question doesn't make any sense to you?

A No, sir.

Q Do you know whether all 50 governors support this lawsuit?

A [91] I don't know.

Q Could you explain the statement at the end of paragraph six of the verified complaint that the Conference brings this action on its own behalf and on behalf of its members?

A Can I explain that statement?

Q That is what I asked you.

A That is an action of the executive committee of the Governors' Conference.

MR. CHARLES RHYNE: All right. Now you have answered the question. I am trying to speed this up a little bit.

You have answered it, just stop there.

BY MR. DODELL:

Q Do you know whether – let me strike that.

And that is the entire basis of that statement, is that correct?

A Yes.

Q Have any governors indicated that they do not support this suit?

A No, sir.

Q On page nine of the complaint, in the last two [92] sentences the statements are made, "In providing these essential government services plaintiffs extensively used voluntary boards and commission whose members are not compensated –"

A I am sorry. I am not following.

Q This is the complaint, page nine. The last sentence in paragraph 16. The last two sentences.

A All right.

Q "In providing essential government services Plaintiffs extensively use voluntary boards and commissions whose members are not compensated or who are paid nominal compensation. The Act makes use of these voluntary boards, commissions, and workers financially impossible."

Now, the Act does not eliminate voluntary noncompensated boards, does it?

A I don't know.

Q Do you know whether the 1966 amendments resulted in a cutback of the government services that were covered by that Act?

A Would you repeat it again?

MR. DODELL: Would you read that back, please?

(The question was read as requested.)

[93] THE WITNESS: No, I don't know. I would like to – again, counselor, make an observation on the

previous question, where you asked me about the Act: Does it – and I will give – I gave you an "I don't know."

I should point out that it has been indeed several days, if not weeks, since I read that Act. There is a lot yet that I have to read. I think the question is really unfair almost to put any question to me, does that Act specifically allow this or that or anything else, particularly I would go back as I have done previously to the whole body, both of law and of regulations in the Department of Labor.

I think if I might respectfully indicate that it is somewhat unfair for me to be asked a question or no question in that respect.

BY MR. DODELL:

Q Well, there is no intention on my part to be unfair, Mr. Byrley.

A I understand.

Q I simply ask the questions that I think it is appropriate to ask.

MR. CHARLES RHYNE: You are not a lawyer. We understand that.

[94] MR. DODELL: I meant to say I didn't mean to put you in a position that is unfair.

I would like about a five-minute recess to consult with my colleague.

MR. CHARLES RHYNE: Fine.

(Recess.)

MR. DODELL: We have nothing further, Mr. Rhyne, and Mr. Byrley.

Thank you very much.

THE WITNESS: Thank you, sir.

MR. CHARLES RHYNE: Let's stipulate that without the depositions being signed, that they shall be filed with

the court right away, without either side waiving their right to make any corrections that they feel may be necessary and that may be either mutually agreed upon or presented to the court for decision.

We stipulate that the depositions and all the documents that have been marked and referred to here may be filed with the court for use of either party as they see fit.

MR. DODELL: Thank you very much for that.

Mr. Rhyne, can I just ask one thing? There is [95] a large volume of exhibits which we have not duplicated. Would it be agreeable to you to file the depositions and then as soon as we duplicate the exhibits file them? Would you want to withhold the filing of the depositions until we get the exhibit duplicated?

MR. CHARLES RHYNE: I would say we can furnish a set of our exhibits to the reporter so he can bind them right in with the record, at the time he files them.

MR. DODELL: You can do that now you mean? We still have to duplicate some of our exhibits.

MR. CHARLES RHYNE: All right. Suppose we furnish him our set of everything, and then you furnish yours when you can?

MR. DODELL: In the meantime, the depositions with as many exhibits as are there can be filed and we will supply the others as soon as possible.

(The documents referred to were marked as Joint Deposition Exhibits 4(a), (b), and (c), and 6(a), (b), and (c) for identification.)

(Whereupon the taking of the deposition was adjourned at 12:45 p.m.)

[Certificate omitted in printing]